TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912

No. 469

MARY GENEVIEVE PENNELL, ADMINISTRATRIX OF THE ESTATE OF JAY ALLEN PENNELL, DECEASED, PLAINTIFF IN ERROR,

vs.

PHILADELPHIA & READING RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED FEBRUARY 24, 1913.

(23,561)

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INDEX.

	Page
Transcript from the district court of the United States for the eastern district of Pennsylvania	1
Docket entries	1
Writ of error	2
Statement of claim	4
Plea	7
Jury	7
Verdict	8
Bill of exceptions	8
Evidence for plaintiff	9
Testimony of Mary G. Pennell	9
Frank Shellhammer	22
Morris K. Walley	36
Norman C. Shover	42
Carl H. Fessler	48
Arthur P. Hensel	53
M. F. Wise	55
James E. Mellon	61
Lawrence Weber	70

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Page

Plaintiff rests ... 75
Motion for instruction for defendant ... 75
Defendant offers no evidence ... 75
Case argued to the jury ... 75
Charge of the court ... 75
Judge's certificate to bill of exceptions ... 77
Motion and reason for new trial ... 77
Opinion ... 77
Præcipe for judgment ... 78
Judgment ... 78
Assignments of error ... 79
Præcipe sur transcript of record ... 80
Clerk's certificate ... 81
Hearing and submission ... 82
Opinion ... 83
Judgment ... 84
Assignment of errors ... 84
Petition for writ of error ... 86
Order allowing writ of error ... 87
Bond on writ of error ... 87
Writ of error ... 88
Clerk's certificate ... 89
Citation and service ... 89

DECEMBER SESSION, 1911.

George Demming

1734

W. C. Mason

Mary G. Pennell, Administratrix of the Estate of Jay Allen Pennell, Decd.,

vs.

Philadelphia and Reading Railway Company.

1912	March	2	Praecipe for Summons filed. Summons exit returnable the first Monday of March inst. Statement of Claim filed. Rule to plead filed.
"	"	4	Summons returned "served" and filed.
"	"	7	Order for the appearance of William Clarke Mason, Esquire, for defendant filed. Plea filed.
"	"	8	Order to place case on trial list filed.
"	April	15	Jury called.
"	"	16	Verdict for defendant.
"	"	19	Motion for new trial filed.
"	May	10	Opinion, McPherson, J., refusing motion for new trial filed.
"	"	20	Bill of Exceptions filed.
"	"	21	Praecipe for judgment filed. Judgment accordingly. Judgment filed.
"	"	29	Assignment of errors filed. Petition for writ of error filed. Order allowing writ of error filed.

		Bond sur writ of error in the sum of $100.00 filed.
		Order approving bond sur writ of error filed.
		Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
		Citation allowed and issued.
		Praecipe for transcript of record sur writ of error filed.
" June	4	Citation returned "service accepted" and filed.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania,

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Mary G. Pennell, Administratrix of the Estate of Jay Allen Pennell, Decd., Plaintiff, against Philadelphia and Reading Railway Company, Defendant, a manifest error hath happened, to the great damage of the said Mary G. Pennell, Administratrix of the Estate of Jay Allen Pennell, Decd., as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of

Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable the Judges of the District Court of the United States, at Philadelphia, the 29th day of May, in the year
(SEAL) of our Lord one thousand nine hundred and twelve.

HENRY B. ROBB,
Deputy Clerk of the District Court of the United States.

Before McPHERSON, *J.*

Allowed:—

BY THE COURT.

Attest:

HENRY B. ROBB,
Deputy Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA.

December Term, 1911. No. 1734.

MARY G. PENNELL, a citizen of the State of Maryland, and Administratrix of the Estate of Jay Allen Pennell, Deceased,

vs.

PHILADELPHIA & READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania.

PLAINTIFF'S STATEMENT OF CLAIM.
Filed March 4, 1912.

The plaintiff, Mary G. Pennell, being a citizen of the State of Maryland, and Administratrix of the Estate of Jay Allen Pennell, Deceased, seeks to recover from the defendant, the Philadelphia & Reading Railway Company, a Corporation of the State of Pennsylvania, the sum of Fifty thousand dollars ($50,000.00), upon the cause of action of which the following is a statement:

The plaintiff, Mary G. Pennell, as Administratrix of the said Estate, brings this action for the benefit of Mary G. Pennell, widow of Jay Allen Pennell, deceased, and Anna E. Pennell, infant daughter of said Jay Allen Pennell, deceased, aged about two years and six months. Said plaintiff also brings this action under and in accordance with the provisions of the Acts of Congress, approved April 22, 1908, and April 5, 1910, being an Act of Congress and an Amendment to

the same relating to the liability of common carriers by railroad to their employees in certain cases.

The defendant, the Philadelphia & Reading Railway Company, is a common carrier corporation, engaged in the business of transportation for hire, both of freight and passengers, and is engaged in Interstate and Foreign Commerce, being incorporated for this purpose under the laws of the State of Pennsylvania.

On and about the 31st day of December, 1911, said Jay Allen Pennell, the husband of said widow, Mary G. Pennell, and father of said child, was employed (and had been for some considerable time previously) by said defendant corporation in the capacity of fireman on an engine or locomotive, belonging to and controlled by said defendant corporation, and pulling, drawing and hauling one of defendant's train of cars, carrying interstate and foreign commerce and traffic, engaging in commerce between several States, and on its way from a point near Harrisburg, Pennsylvania, to a point near and at Hagerstown, Maryland, and on and about the cars, engines, appliances, machinery, track, roadbed and other equipment used, owned, controlled, operated and directed by said defendant corporation in said interstate and foreign commerce and traffic.

While said Jay Allen Pennell, on and about said date, was engaged in the proper, careful and necessary performance of his duties as fireman of said locomotive of said train, and when said train had arrived at a point near what is known as Moore's Mills, near Mount Holly, Cumberland County, Pennsylvania, without any negligence or carelessness whatsoever on his part, and due entirely to the negligence, carelessness and oversight of defendant corporation, its servants and employees, its failure to supply proper, necessary and safe devices, instruments, machinery, appliances and apparatus, its failure to have proper and needed inspection, testing and replacement of parts, devices and apparatus, and due to the failure of said defendant

corporation to observe, abide by and carry out the requirements, directions and commands of the Acts of Congress approved March 2, 1893, amended April 1, 1896, approved March 2, 1903, and approved April 14, 1910, being an Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes, and the various amendments to said Act, otherwise known as the Safety Appliance Acts, and the rules and directions of the Interstate Commerce Commission formulated and proclaimed under and in accordance with said Acts, the coupling and parts between the said locomotive or engine and the tender following, holding and attaching the two together, broke, gave way and failed, thereby throwing, precipitating and allowing to fall, said Jay Allen Pennell, between said engine and tender, and causing said Jay Allen Pennell to fall to the ground and track below, whereby he was run over, crushed, and otherwise grievously and fatally injured, so that he died within a very short time afterwards.

And by its usage and practice, causing and allowing said coupling and parts to break, give way and fail, it is especially and particularly charged by plaintiff that defendant corporation violated and disregarded the provisions and requirements of the Acts of Congress mentioned and referred to in the preceding paragraph, popularly known as the Safety Appliance Acts.

By reason of the death and killing of said Jay Allen Pennell, in the manner as above described, said widow and child are deprived of the fellowship and companionship of husband and father, are robbed and deprived of his support and maintenance for all time to come; and said widow is put to great expense and loss for funeral expenses and burying her said de-

ceased husband, and otherwise thrown absolutely on her own resources and personal efforts and the mercies of a callous and cold world for the sustenance and livelihood of herself and child, and altogether damaged in the sum of Fifty thousand dollars ($50,000.00) as above set forth.

Wherefore plaintiff brings this suit.

GEORGE DEMMING,
Attorney pro Plaintiff.

PLEA.
Filed March 7, 1912.

Defendant Railway Company pleads—Not Guilty.

WM. CLARKE MASON,
Counsel for Defendant.

To Clerk of said Court.

JURY.

And afterwards, to wit, on the 15th day of April, 1912, a jury being called came, to wit:

Charles A. Stein	George T. Moxey
Henry D. Allen	D. M. Leopold
S. Harvey Thomas	E. C. Gery
George W. Chapman	Ernest E. Parker
A. L. Rhoads	F. M. Borden
J. F. Power	Jacon B. Naftzinger,

who were respectively sworn or affirmed to well and truly try the issue joined.

VERDICT.

And afterwards, to wit, on the 16th day of April, 1912, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for defendant.

BILL OF EXCEPTIONS.

Be it remembered, that in the said term of December came the said plaintiff into the said Court, and impleaded the said defendant in a certain plea of Trespass, &c., in which the said plaintiff declared (prout narr) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at the County aforesaid before the Honorable John B. McPherson, Judge of the said Court, the 15th and 16th days of April, 1912, the aforesaid issue between the said parties came to be tried by a jury of the said County for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said Mary G. Pennell called the following named witnesses and produced the following evidence (prout evidence offered by plaintiff, as shown by the the stenographic transcript filed herewith; and thereupon the defendant offered no evidence; which was all the evidence produced by both sides, and thereupon the Court charged the jury as follows (prout charge of the Court, as shown by the stenographic transcript filed herewith and approved by the Court):

Before Hon. John B. McPherson, *J.*, and a Jury.

Philadelphia, Pa., Monday, April 15, 1912.

Present:

George Demming, Esq., representing the plaintiff;

W. Clarke Mason, Esq., representing the defendant.

PLAINTIFF'S EVIDENCE.

Mrs. Mary G. Pennell, having been duly sworn, was examined and testified as follows:

By Mr. Demming:

Q. Where do you live now?

A. Bloomsboro, Maryland.

Q. Where did you live on December 31, 1911, last year?

A. Harrisburg, Pennsylvania.

Q. Was Jay Allen Pennell your husband?

A. Yes, sir.

Q. By whom was he employed?

A. The Philadelphia & Reading Railway Company.

Q. And in what capacity?

A. Fireman.

Q. On what kind of a locomotive?

A. A freight train.

Q. A freight locomotive?

A. Yes, sir.

Q. How long had you been married to him?

A. Three years.

Q. Have you your marriage certificate?

A. Yes, sir. (Marriage certificate produced.)

Mr. Demming: Mr. Mason, do you want to see it?

MR. MASON: No; she said she is his widow; there is no doubt about it.

By MR. DEMMING:

Q. Have you any issue by your husband—any children?

A. One.

Q. What is the name of this child?

A. Anna Elizabeth.

Q. Anna Elizabeth Pennell?

A. Yes.

Q. A little girl?

A. Yes.

Q. How old is she?

A. She is two and a half years.

Q. That is the only child you have?

A. Yes, sir.

Q. Have you taken out letters of administration on your husband's estate?

A. Yes, sir.

Q. (Paper shown witness.) Are those the letters?

A. Yes, sir.

MR. DEMMING: The letters of administration are offered in evidence, as follows:

"The State of Maryland.

To All Whom These Presents Shall Come or May Concern:

Know Ye, That on the second day of February in the year of our Lord one thousand nine hundred and twelve, Letters of Administration on the personal estate of Jay Allen Pennell, late of Washington County, deceased, were regularly granted unto Mary G. Pennell by the Orphans' Court of said County, duly thereunto elected, commissioned and qualified according to the Constitution of the State of Maryland, aforesaid, and on the same day and year aforesaid the said Mary G. Pennell came into the said Court, and accepted of the said ap-

pointment, and gave bond in the penalty of $100, with security, which was approved by the said Court, for the faithful performance of her trust as Administratrix as aforesaid, and that she is still the acting Administratrix of said estate.

In Testimony Whereof, I, Thos. E. Hilliard, Register of Wills for said County, do hereunto set my hand and affix the public seal of my office, this second day of February, A. D. 1912.

(SEAL) Thos. E. Hilliard.
Register of Wills.

State of Maryland, Washington County, to wit:

I, Wm. Gassman, Chief Judge of the Orphans' Court of Washington County, in the State of Maryland, do hereby certify that Thos. E. Hilliard is the Register of Wills in and for the County aforesaid, and that the foregoing attestation by him is made in due form and by the proper officer.

In Witness Whereof, I do hereunto set my hand and affix my seal, at Hagerstown, in said county, second day of February, A. D. 1912.

Wm. Gassman.
(L.S.) *Chief Judge.*

State of Maryland, Washington County, to wit:

I, Thos. E. Hilliard, Register of Wills for Washington County, in the State of Maryland, do hereby certify that Wm. Gassman, Esq., who appears to have taken and signed the foregoing attestation, was at the time of taking and signing the same, and still is, the Chief Judge of the Orphans' Court of Washington County aforesaid, duly thereunto elected, commissioned and qualified according to the Constitution of the State of Maryland aforesaid, and to all his acts as such full faith

and credit are and ought to be given, as well in Courts of Justice as thereout.

In Testimony Whereof, I do hereunto set my hand and affix the public seal of my office this second day of February, A. D. 1912.

(SEAL) Thos. E. Hilliard,
Register of Wills for Washington County."

By MR. DEMMING:

Q. They were taken out in Bloomsboro, Maryland?

A. Hagerstown.

Q. That is the County seat?

A. Yes, sir.

Q. What was the last you saw of your husband alive?

A. Three o'clock on Sunday morning.

Q. Three o'clock on Sunday morning?

A. Yes, sir.

Q. What date?

A. December 31st.

Q. The 31st of December, 1911?

A. Yes, sir.

Q. And what was the occasion? What was he doing then?

A. He was going to work.

Q. He was going to work?

A. Yes, sir.

Q. He went to work as fireman for the Philadelphia & Reading Railway road that morning?

A. Yes.

Q. What time that morning did he leave?

A. He left about 3 o'clock.

Q. In the morning?

A. Yes.

Q. It was dark?

A. Yes.

Q. Do you know what time his crew left for Hagerstown?

A. 3.30, I think.

Q. 3.30?

A. 3.30.

Q. And left Rutherford yards, was it?

MR. MASON: Unless she knows, you had better wait until you get somebody who does know.

By MR. DEMMING:

Q. He left your home in Harrisburg?

A. Yes.

Q. Where did you live in Harrisburg at that time?

A. 312 North Street.

Q. What was the next you knew?

A. I did not hear anything until 10 o'clock Sunday morning, that he was killed.

Q. That is the same morning he left?

A. Yes, sir.

Q. In what way did you get word?

THE COURT: Never mind these unimportant details.

By MR. DEMMING:

Q. What sort of a man was your husband? How old was he?

A. Thirty-two years old.

Q. How about his height? How tall was he?

A. He was about five feet eleven inches.

Q. How much did he weigh?

A. One hundred and seventy-five pounds.

Q. What was the condition of his health?

A. It was good.

Q. You say good. Had you ever known him to ever lose a day on account of illness?

A. No, sir. When he was burned that time. That is all. He was burned once. That was all.

Q. He was burned once?

A. Yes.

Q. That was while he was performing his duties?

A. Yes.

Q. Did you ever know him to have medical attention outside of that burn?

A. No, sir.

Q. Did he have any organic trouble that you know of?

A. No, sir.

Q. Do you know of your own knowledge how much he earned?

A. An average of $85 a month.

Q. $85 a month?

A. Yes.

Q. How was he paid? By the month or by the week, or what?

A. By the month.

Q. What was the lowest he earned that you know of, as fireman?

A. Well, about $65.

Q. What was the highest he ever earned?

A. He did earn $102.

Q. $102?

A. Yes, sir.

Q. The average you think was about $85?

A. Yes.

Q. How much of that money would he give you for the support of yourself and your child?

A. He brought it all home and gave it to me.

Q. Gave it all to you?

A. Yes.

Q. How much then would you give him each month for his own use?

A. Five dollars.

Q. Is that all?

A. Yes, sir.

Q. About $5?

A. Yes, sir.

Q. And the rest was used how?

A. To keep up the home expenses.

Q. For yourself and child in the home?

A. Yes, sir.

Q. What were your funeral expenses?

A. $102.

MR. MASON: I object to that. I do not think that is an item of damage. Is that an item of damage in this suit? I do not think it is an item of damage in this suit, because, as I understand it, all that she can recover would be the value of his life to the family and not any expenses.

THE COURT: I am not prepared to say that, under the Act of Congress.

(Objection overruled.)

(Exception noted for defendant, by direction of the Court.)

By MR. DEMMING:

Q. That bill has been rendered to you?

A. Yes.

Q. And you are, as administratrix, responsible for it?

A. Yes, sir.

Cross-examination.

By MR. MASON:

Q. When you say you know how much your husband earned, how do you base your knowledge?

A. He would bring it home and give it to me.

Q. Do you recollect how much he gave you the last month before his death, in November, for instance?

A. He was not working all during the month of November.

Q. So that there were some times during months, some days during months, that he did not earn anything. Is that right?

A. Well, he was not working at all during the month of November.

Q. None at all during the month of November?

A. No.

Q. How about the month of October? Do you recollect how much he gave you that month?

A. No, sir, I do not.

Q. How much did he give you in the month of September?

A. I think $70.

Q. Do you remember how much it was in August?

A. I do not.

Q. How did he give you his wages? Did he give you the check or did he cash it?

A. No, he had the check cashed.

Q. He had the check cashed and then brought you home some money?

A. Yes, sir.

Q. And you cannot recollect how much it was in October?

A. No, sir.

Q. Just how do you fix the definite figures that you gave Mr. Demming, then?

A. Well, it was an average of $85.

Q. What do you mean by an average of $85?

A. Well, that is what it was.

Q. How do you recollect that if you cannot give me the amounts?

A. I just cannot speak of that now.

Q. Was not it nearer to $65 as a usual thing than it was to $85?

A. No, sir.

Q. If I should show you that your husband only received in June, 1911, $64.70; July, 1911, $26.37; August, 1911, $34.04; September, 1911, $64.82; October, 1911 $76.08; November, 1911, $10.37, and December, 1911, $59.30, would not you think that was nearer to the amounts that he received in wages than what you have told us?

A. Those amounts you have mentioned, he was to camp for about two months, during July and August

he was at camp, and, of course, he was not working then.

Q. He was not in camp in June, was he?

A. No.

Q. He was not in camp in September?

A. No.

Q. He was not in camp in December?

A. No, but he was burnt in November and he was not working then.

Q. And he was not working in part of December?

A. No.

Q. You say you only allowed him five dollars a month for his own use?

A. That is all he asked me for.

Q. How about his clothes? Did not he ever buy clothes?

A. Yes, clothes.

Q. That was extra?

A. Of course, he did not buy many clothes.

Q. You do not include his expenses in the five dollars a month, do you?

A. Well, no.

Q. About how much would it cost your husband a month, in addition to the five dollars a month that you allowed him?

A. Well, he very seldom bought very many clothes. One suit a year was all he bought.

Q. Did he have any other expenses at all?

A. No, sir.

Q. Nothing except the five dollars?

A. No, sir.

Q. You are familiar with your husband's signature, are you not?

A. Yes, sir.

Q. I show you his application to the Relief Association and ask you whether that is his signature there?

A. Yes, sir.

(Application to the Philadelphia & Reading

Relief Association marked for identification "Exhibit A.")

By Mr. Mason:

Q. I show you a release to the Philadelphia & Reading Relief Association, under application No. 128518, and ask you whether that is your signature?

A. Yes, sir.

(Release marked for identification "Exhibit B.")

By Mr. Mason:

Q. I show you a receipt of the Philadelphia & Reading Relief Association, dated January 15, and ask you whether that is your signature to that?

A. Yes, sir.

(Receipt marked for identification "Exhibit D.")

By Mr. Mason:

Q. And check of Drexel & Company, signed by the Treasurer of the Philadelphia & Reading Relief Association, dated January 2, 1912, endorsed by you. Is that your signature?

A. Yes, sir.

(Check marked for identification "Exhibit C.")

Re-direct-examination.

By Mr. Demming:

Q. You have identified your signature on one of these papers, or all of these papers?

A. Yes.

Q. When that so-called release was signed, do you remember the circumstances under which it was signed?

A. Yes, sir.

Q. Just tell the Court and jury under what circumstances you signed that release.

MR. MASON: I cannot see under what conditions that would be material.

THE COURT: It is cross-examination, for one thing.

MR. MASON: This is his witness. Even if he were cross-examining my witness I cannot see the materiality of it in this case. I would object to it.

THE COURT: If you ask the question, how are you to then object to it, that it is not material?

MR. MASON: I asked her whether she signed that release.

THE COURT: Yes. Then is not it cross-examination to know the circumstances under which she signed it?

MR. MASON: This is his witness.

THE COURT: You opened the question in your cross-examination.

MR. MASON: I do not think it is material.

By MR. DEMMING:

Q. Tell the circumstances under which you signed that release.

A. Because I needed the money.

Q. I know that. Where was that release signed?

A. In Harrisburg, in Alderman Windsor's office.

Q. And who was present?

A. The Alderman and I think the relief clerk.

Q. The man who came from the Reading Railroad with the check and the release?

A. Yes, sir.

Q. Who else?

A. And you.

Q. And I was present?

A. Yes.

Q. Just say what you stated at the time you signed that release.

MR. MASON: I object to that. I do not want Mr. Demming to lead us into a realm of immaterial things.

THE COURT: You opened this question yourself.

MR. MASON: I identified certain papers.

THE COURT: You opened the question yourself. It was not cross-examination and you opened the whole subject by your question.

MR. MASON: I was simply saving time. Suppose I had put this witness on the stand?

THE COURT: I am not criticizing you at all, but you opened up a new question by your question.

MR. MASON: My thought would be this, that would her testimony, as to what she said, be evidence in this case? Of course, I would put her back on the stand and have her identify these papers.

THE COURT: I see no objection to her testifying to what took place at that time.

(Objection overruled.)

(Exception noted for defendant, by direction of the Court.)

By MR. DEMMING:

Q. At the time you signed that release, did you lodge a protest with the Alderman?

A. Yes, sir; I did.

Q. And protest that you were only signing for the relief money?

A. Yes, sir.

Q. And for nothing else?

A. That is all.

Q. And that was expressly understood at the time you did so?

A. Yes, sir.

Q. When Mr. Pennell was in camp—you have said, in reply to the gentleman on the other side, that Mr. Pennell, during some of these months he asked you about, was in camp?

A. Yes.

Q. Did he receive money? Was he paid by the State?

A. Yes, sir.

Q. And that money was paid to you also, was it?

A. Yes, sir.

Q. In order to show the kind of a man he was and the condition of his health, have you his picture?

A. Yes, sir.

Q. Have you a recent picture, taken before his death?

A. Yes, sir; during camp I have one.

Q. The camp of 1911?

A. Yes.

Q. Have you those pictures with you?

A. Yes, sir.

Q. Let us see them.

(Pictures produced.)

Q. Which is Mr. Pennell? That is he, is it?

A. Yes, sir.

Q. Which one is that?

A. The second one.

Q. The second one from the right on the back row?

A. Yes, sir.

Q. He belonged to the National Guard?

A. Yes.

Q. And that accounts for his uniform?

A. Yes, sir.

Re-cross-examination.

By Mr. Mason:

Q. At the time that you signed this release which

you have identified in the Alderman's office you understood what was in that release, did you not?

A. Yes, sir.

Q. And did not the Alderman tell you that you must sign it without any qualifications or he would not let you sign it in his office?

A. No, sir.

Q. That you must sign it as the release that is set forth to be, or he would not witness your signature, and you would have to take it somewhere else?

A. No, sir.

Q. And did not you sign it with that understanding?

A. No, sir.

FRANK SHELLHAMMER, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. I live at 1192 Cherry Street at present, Harrisburg.

Q. Your business is what?

A. Locomotive engineman.

Q. And you work for the Philadelphia & Reading Railway Company, the defendant here?

A. Yes, sir.

Q. How long have you worked for them?

A. I have been working for them for about seven years.

Q. Were you the engineer on this locomotive on which Pennell was killed?

A. I was.

Q. You were extra engineer then?

A. Yes, sir.

Q. Not a regular engineer for them?

A. No, sir.

Q. You were going at the time of this death from where to where?

A. From Rutherford to Hagerstown.

Q. Rutherford yards, I think you call them, do you not, near Harrisburg, Pennsylvania?

A. Yes.

Q. To Hagerstown, Maryland?

A. Yes, sir.

Q. How many cars had you on that train?

A. Forty-four, I think.

Q. Were they loaded or empty?

A. Some were loaded and some were empty; most of them empties.

Q. In addition to the forty-four cars, you had the caboose, had you, or do you include that?

A. No, sir; that is not included; that is separate.

Q. That is in addition? That would make forty-five?

A. Yes.

Q. And the engine and the tender?

A. Yes.

Q. What was the number of your engine?

A. 1568.

Q. What time did you leave Rutherford?

A. I could not tell the exact time of leaving.

Q. About?

A. I think we left about close on to 5 o'clock.

Q. In the morning?

A. Yes.

Q. Of December 31, 1911?

A. Yes.

Q. About where did the accident happen?

A. About a mile and a half east of Moore's Mill.

Q. East of Moore's Mill?

A. Yes.

Q. That is in Cumberland County, Pennsylvania, is it not?

A. Yes.

Q. What sort of a fireman was Mr. Pennell?

A. He was a first-class man as a man and as a workingman.

Q. A capable fireman?

A. Yes, sir.

Q. Was his work satisfactory?

A. Yes.

Q. Had you known him for some time?

A. I had known him for at least a year or so.

Q. Was he a man of industrious habits?

A. Yes, he was, as far as I know.

Q. Working whenever he could?

A. Yes, sir.

Q. How about his health?

A. I do not know anything about his family affairs or health.

Q. I do not mean his family. His health. Was he a healthy man?

A. I don't know anything about his health.

Q. Did you ever know him sick?

A. I don't know that I know.

Q. Do you know how much he was earning a day at that time?

A. I do not.

Q. Or a month.

A. No.

Q. Tell the Court and jury in your own way how the accident happened.

A. Well, we were running along about fifteen miles an hour when I felt the application of air, and looked back and saw my engine was pulling away from the tender, and I released the brakes on the engine and kept the engine away from the train to avoid the collision. After the engine had stopped I left the engine come to a stop and hunted up Mr. Pennell, and found him under the front truck of the fifth car.

Q. You found him where?

A. Under the front truck of the fifth car.

Q. Under the front truck of the fifth car?

A. Yes.

Q. Then the tender and four cars had gone over him?

A. Yes, sir.

Q. What kind of an engine was this?

A. It was what we call an I-8 class.

Q. The I-8 class?

A. Yes.

Q. Where was your cab? In the middle?

A. The cab is located on about the middle of the boiler.

Q. About the middle of the boiler?

A. Yes, sir.

Q. And where would the fireman stand?

A. The fireman has a platform that is built on to the tank.

Q. Back of you?

A. Back of the rear of the boiler, back of the fire-box part of the boiler.

Q. That would bring him about how many feet back of you?

A. About twelve feet, as near as I can tell.

Q. Could you see him from your position?

A. No, sir.

Q. What was the last you saw of Pennell?

A. I cannot recall seeing him anywhere after I left Grantsville.

Q. Grantsville is how far from the place of the accident?

A. About eight or ten miles, as near as I can tell. I took water at Grantsville. That is the last I recall seeing him.

Q. Where was Pennell's proper position? Where should he have been?

A. On the platform of the tank.

Q. By the platform of the tank, what do you mean?

A. Where the fireman had to work to get coal to feed to the fire-box.

Q. By the platform of the tank you mean that projection of the engine that goes over the opening between the tender and the locomotive?

A. There practically is not any opening. The engine and tender are coupled about that close (indicating).

Q. About how close?

A. About that close.

Q. The engine and tender?

A. Yes.

Q. How many inches do you call that?

A. About six or eight inches, as near as I can tell.

Q. The platform and that sill of the tender came within about six inches of the sill of the locomotive. Is that what you mean?

A. Yes, sir.

Q. Is not there something that goes over that opening?

A. No, nothing more than there are two aprons under each fire door, but they are not down as low as the tank. They are a little ways above the tank, to avoid the coal, while you are shoveling it in the doors, from dropping on the track.

Q. To avoid what?

A. It is to avoid the coal from dropping to the tracks.

Q. To prevent the coal from dropping through there to the track?

A. Yes.

Q. Is not that there also for the purpose of the fireman standing upon it?

A. No.

Q. It is not?

A. No.

Q. Does not he, in the course of his duties, have to stand on it?

A. No; it is about that far above the floor of the tank.

Q. Where does the fireman stand on that engine?

A. On the platform of the tank.

Q. With regard to the opening between the engine and the tender, where does he stand?

A. The same place. That opening does not concern him any. That is in front of him.

Q. Do you mean he straddles the opening with his feet?

A. No; the opening is in front of him, just as I tell you.

Q. The opening is in front of you?

A. Yes, sir.

Q. How far in front of him?

A. That platform, as near as I can tell, is about four or five feet wide.

Q. Four or five feet away?

A. Wide.

Q. Four or five feet wide?

A. Yes, from the engine to the doors that hold the coal.

Q. Was that tender loaded with coal?

A. Yes, it was loaded leaving Rutherford.

Q. How far front would the coal come?

A. The coal did not come to between about three or three and a half feet to the rim of the tank platform.

Q. Three to three and a half feet of what?

A. Of the rim of the tank platform. There is a rim that runs around the tank platform to avoid the coal from rolling on the tracks.

Q. And that rim is to keep the coal back, to keep it in place?

A. To keep it from rolling on the tracks.

Q. Then Pennell was standing in front of the rim, was he not?

A. No, he was standing back of the rim. The rim is right around the edge of the tank, as though the rim was around there (indicating).

Q. Would Pennell stand near this crack, this opening, between the locomotive and the tender?

A. He would practically stand about two and a half feet away from the opening.

Q. Two and a half feet away?

A. Yes.

Q. Depending upon what he was doing at the time?

A. Yes.

Q. If he would step up to the door of the fire-box he would be practically right over it, would he not?

A. No, he would not be over it. He would not get over it, but he would be closer to it.

Q. Very close to it?

A. Yes.

Q. You looked back. You felt the air pressure going on?

A. Yes, sir.

Q. You looked back, and you saw the train, you say, falling back?

A. Following the engine.

Q. It was following you?

A. Yes.

Q. But you could see you were making a space between the locomotive and the tender?

A. Yes.

Q. Did you know where the air came from that caused this thing to happen?

A. Yes, I certainly knew where it came from, but I did not know where the break was.

Q. You knew it came from the train?

A. Yes.

Q. But you did not know what car it came from?

A. No, I did not know where the air was applied from.

Q. Had you applied the air from the engine?

A. No, sir.

Q. How did you know that?

A. Because I did not apply it. I know I did not apply it.

Q. Had you a gauge right in front of you?

A. Sure.

Q. You could tell by that gauge that the air did not come from the engine?

A. I could tell by that gauge that the air was leaving the engine by some cause of a parting or bursting of some kind.

Q. By that you mean the air hose between the tender and the engine had broken, and the air was leaving the engine. Is that what you mean?

A. Sure.

Q. You have a lever there in the engine by which you can put the air on the entire train, have you not?

A. It puts itself on automatically.

Q. It did just at the time of the accident, but in case you see something ahead of you on the track you could put the air on from the engine, could you not?

A. Yes.

Q. Where was that lever located?

A. The lever is located right aside of you.

Q. Right beside you?

A. Yes.

Q. Had you touched the lever or done anything to it?

A. No, sir.

Q. You had nothing to do with the air going on?

A. Nothing whatever.

Q. I just wanted to bring out the facts. I am not charging you with having done it. We want to get the fact. Did you see your gauge going backwards at the time?

A. I saw the train coming down.

Q. When you felt this air going on, what first called your attention to it?

A. I felt the brakes applying.

Q. You felt the sensation?

A. You could feel the compression of the brakes on the drivers, and that draws your attention to look at the gauge.

Q. You felt that through your body instinctively: you knew something had put the air on?

A. I felt the drivers grinding, and the first thing

that would draw your attention is to look at the gauge, to see if the air is leaving, and I did, and at the time I looked at the gauge I shut the throttle and looked back and saw where part was, and I saw where part was, and I released the brakes on the driver and kept the engine away from the tender to avoid a collision.

Q. Had your gauge been indicating any leakage before that?

A. No, I did not have any trouble whatever with the air. Nothing else on the trip.

Q. Nothing at all before that?

A. No.

Q. Nothing to call your attention to any leakage anywheres on the train?

A. No, sir.

Q. Why, if the air had been put instantly on the whole train, as you afterwards ascertained, why had it been put upon the drivers of your engine at the same time?

A. It did.

Q. And then how do you explain that your engine pulled away from the tender?

A. Because the engine was working steam, and there was no steam working the cars.

Q. You were then forging straight ahead, knowing nothing had happened?

A. Yes.

Q. Not knowing anything had happened?

A. Yes.

Q. That caused you to go ahead?

A. Yes.

Q. When you finally got stopped you say you found Pennell under the truck, of the front truck of the fifth car?

A. Yes, sir.

Q. What was his condition?

THE COURT: I suppose it is conceded that he died?

MR. MASON: Undoubtedly; yes, sir.

By MR. DEMMING:

Q. He died almost instantly after that?

A. The only sign of life that there was in the body any more was breathing, and he breathed for about twenty minutes after we found him.

Q. Did you examine to see what caused the engine and the tender to part?

A. No, nothing more than we found the pin right alongside of him, and afterwards, while putting the train away, we found the hose uncoupled.

Q. But you did not—

A. I did not examine the hose coupling. I did not see it.

Q. You mean the hose of the car?

A. Yes.

Q. You are not talking about the hose of your locomotive?

A. No, the hose on the car.

Q. You did not go back and examine it?

A. No.

Q. You found the pin, you said, alongside of Pennell?

A. Yes.

Q. What pin was that?

A. The tender pin of the pulling bar.

Q. The tender pin?

A. Yes.

Q. What condition was it in?

A. Well, to my mind the pin was a clean break.

Q. Was it broken?

A. Yes, it was broken.

Q. It was broken?

A. Yes.

Q. About what part of the pin was broken?

A. About the center of the pin. It was broke about the center of the pulling bar.

Q. The center of the pin?

A. Yes.

Q. Do you know where that pin is, or what became of it?

A. I do not. I do not know where the pin is.

Q. Did you look at the casting on the drawing bar?

A. I did.

Q. Was it broken?

A. No, sir.

Q. Did you look for the pin on the locomotive itself, on the other end of the drawing bar?

A. Not particularly.

Q. There was nothing to indicate that was broken?

A. Nothing to indicate it was broken, because the bar was fast in it.

Q. The tender is an entirely separate car from the locomotive, is it not?

A. Yes, sir; they are coupled with a draw bar.

Q. And the kind of coupling between the tender and the locomotive was a draw bar and pin?

A. A draw bar and pin, yes, sir.

Q. The couplings on all the other cars of that train, and from the tender to the first car, were what kind?

A. Automatic couplers.

Q. This, then, was the only draw bar coupling on that entire train?

A. Yes, sir.

Cross-examination.

By Mr. Mason:

Q. The coupling between the engine and tender is in the nature of a permanent coupling, is it not?

A. Yes, sir.

Q. And attached to the engine is a draw bar?

A. Yes, sir.

Q. And that fits into the yoke of the tender?

A. Yes.

Q. And the pin is dropped down to bind those two together?

A. Yes.

Q. That is the pin you refer to?

A. Yes, that is the pin.

Q. That pin, you said, was broken about in the center?

A. About in the center of the pulling bar, yes, sir.

Q. It was a clean break, as I understand you to say?

A. Yes, sir.

Q. When you left Rutherford, how far after you had left did the accident happen? About how many miles?

A. As near as I can tell, about thirty-four or thirty-five miles.

Q. And had you made any stops between Rutherford and the place of the accident?

A. Yes, sir, I did.

Q. Had you left any cars off?

A. No, sir.

Q. Those were through cars, I understand?

A. Yes, sir, the same cars that we had on leaving Rutherford.

Q. What was the character of the track that you ran over from Rutherford to the place of the accident, so far as grades are concerned?

A. Well, the track varies, up grade, down grade and level.

Q. And what was there from the time you left Rutherford and until you felt the air go on immediately before the accident, that indicated anything wrong with any portion of your train.

A. There was nothing whatever.

Q. Had there been any pulling motion on your train at all?

A. No, sir.

Q. From your engine could you look back and see Pennell in the tank?

A. No, you could not, unless he would be leaning out on the right side.

Q. And when you felt the engine pulling away, and when you looked back, could you see the tank at that time?

A. I could see it making an opening between the engine and the tender.

Q. But you could not see in the tank?

A. No, I could not see in.

Q. About how far did the balance of the train move after your engine before it stopped?

A. According to indications it must have moved four car lengths, and then a tender length.

Q. That is to say, when you got back and found Pennell he was lying between the two rails under the front truck of the fifth car. Is that right?

A. Yes, sir.

Q. And you stopped your engine as soon as you saw the train was under control by air?

A. As soon as the train stopped I left the engine come closer, yes, sir.

Re-direct-examination.

By Mr. Demming:

Q. Did you look at that casting underneath the tank or tender, where the pin comes down from the top, and the bottom is held by a casting there? Did you look at that?

A. That is what you call the yoke where the pin goes through.

Q. You call it a yoke? Did you look at that?

A. The yoke was all right.

Q. That was all right?

A. Yes.

Q. Was it worn at all?

A. No.

Q. You are sure of that, are you?

A. It did not show any signs of wear whatever.

Q. By a clean break of the pin, what do you mean? Do you mean broken straight across?

A. Not actually straight across, because it was not a straight break. It was kind of a slanting break, but it was a solid break. The iron was solid.

Q. You say the iron was solid?

A. Yes, sir.

Q. That is what you mean by a clean break?

A. That is what I mean by a clean break.

Q. You say now the train was going about fifteen miles an hour?

A. Yes.

Q. Do you remember seeing me in Harrisburg and telling me it was twenty?

A. No, sir, I did not tell you anything of the kind, if you recollect.

Q. You think it was fifteen?

A. Yes, sir.

Q. At the place where you were running, what was the grade?

A. It was practically level where the accident happened.

Q. Level grade?

A. Yes.

Q. And do you recall about the roadbed there? Was it an ash roadbed?

A. Yes, sir, an ash roadbed.

Q. And were you on a straight track or a curve?

A. It is a slight curve where the accident occurred.

Q. A slight curve? To the right, to the left?

A. To the left.

Q. Had the rear portion of the train gotten on that curve yet?

A. The rear portion was on the reverse curve.

Q. The reverse curve?

A. Yes.

Q. A compound curve?

A. Yes, sir.

Q. That is, the rear portion was going this way, and the front was going that way (indicating)?

A. Yes.
Q. Forming slightly a letter S?
A. Yes.
Q. Is that right?
A. Yes, sir.

MORRIS K. WALLEY, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live.
A. Harrisburg.
Q. And the street number?
A. 1415 Swatira Street.
Q. What is your business?
A. Conductor; freight conductor.
Q. On what road?
A. Philadelphia & Reading.
Q. How long have you been with them?
A. About eight years.
Q. How long have you been conductor?
A. Almost seven years, between six and seven.
Q. You were the conductor of Pennell's crew?
A. Yes, sir.
Q. Will you tell us first how long you had known Mr. Pennell?
A. I had known him possibly a year and a half before the accident.
Q. What kind of a man was he with regard to his health?
A. As far as I know, he was healthy.
Q. Was he a large, strong man?
A. Yes.
Q. With regard to his habits, was he industrious?
A. Yes, sir.
Q. Was he a man of good habits?
A. Yes, sir.
Q. Do you recall the time of this accident?

A. Yes.

Q. Just tell the Court and jury in your own way what you know about it.

A. We were going along. We had left Rutherford about 4.30 that morning.

Q. December 31, 1911?

A. Somewhere from 4.30 to 5 o'clock. Everything had moved along in the usual way until the accident occurred about one mile east of Moore's Mill.

Q. You were going from Rutherford to where?

A. To Hagerstown, Maryland.

Q. The whole train bound to Hagerstown?

A. Yes, sir.

Q. Tell us what you know about the accident.

A. That is about all I know. I had ridden in the caboose from Rutherford to the point of the accident. When we went up around there we had made the usual stops that morning—stopped for water and stopped at the Hall stops. When we came to that point, as a matter of course, the first thing I looked out to see what was the trouble, and could see no trouble along there. The brakeman got off at one side and I had started on the other side, when I heard the brakeman say that the engine had parted and the fireman was underneath it.

Q. What first called your attention to it? The stopping of the train?

A. The stopping of the train, yes, sir.

Q. You were in the caboose?

A. Yes, sir.

Q. Then what did you do, come forward to the engine?

A. Yes, sir.

Q. And you were among those who found Pennell?

A. No, sir, I did not find Pennell. I did not get there until after they had taken him out from under the train.

Q. Did you examine the couplings there at the engine?

A. At the engine?

Q. Yes. Did you look in to see what had happened?

A. Yes, sir.

Q. What did you find had happened?

A. The tank pin had broken—the pulling bar pin in the tank end had broken.

Q. And that allowed the engine and tender to separate?

A. Yes, sir.

Q. Had anything else up there broken?

A. No, sir; there was nothing broken except the engine and tank were broken apart.

Q. That coupling between the tender and the engine was an old draw bar and pin coupling?

A. Yes, sir.

Q. Was that the only coupling of that class on that whole train?

A. The only coupling of that class?

Q. Yes.

A. Yes, sir.

Q. What were the other kind of couplings?

A. Automatic couplings.

Q. They were all automatic?

A. Yes, sir.

Q. Except that?

A. Yes, sir.

Q. What caused that coupling to break? What was it that put the strain upon it?

A. The air hose parted in the train, causing the air to apply the emergency and it broke the pin between the engine and tank.

Q. Where did the air hose part?

A. Between the first and second car from the caboose.

Q. The first car from the caboose and the second car from the caboose parted from the air hose?

A. Yes, sir.

Q. That would be the forty-fourth car and the forty-third car?

A. Yes, sir.

Q. Have you the numbers of those cars?

A. No, sir, I have not.

Q. Did you bring your train book with you?

A. No, I have not.

Q. I subpoenaed you to do it, didn't I? Did you get it?

A. Yes.

MR. MASON: I can give you the numbers if you want them.

MR. DEMMING: I have the numbers. You can see if those are the numbers.

MR. MASON: If you have the right numbers I am willing to concede they are the numbers.

By MR. DEMMING:

Q. Would you recall those numbers if I read them to you? 83224. Is that one?

THE COURT: Is that of any consequence whatever?

MR. DEMMING: Possibly not.

By MR. DEMMING:

Q. Did you examine those couplings yourself?

A. No, sir, I did not.

Q. You sent someone else back?

A. After the accident I sent the brakeman back from Moore's Mill and we put the train away with the engine following.

Q. How do you mean "put the train away"?

A. Shoved it up into the siding at Moore's Mill.

Q. Who shoved it up?

A. The following train.

Q. Do you mean the engine uncoupled from the following train?

A. Yes.

Q. And pushed your train into the siding?

A. Yes.

Q. You could not use your own engine?

A. No, sir.

Q. Where was that train made up?

A. At Rutherford.

Q. Did you find all the automatic couplings intact?

A. Yes, sir.

Q. After this accident?

A. Yes, sir.

Q. No other coupling had broken except the draw bar and pin?

A. That was the only coupling.

Q. Did you examine that pin to see whether there were any defects in the pin that broke at the tender?

A. I saw the pin, yes, sir.

Q. Well, what was its condition?

A. It was a clear break, a clean break.

Q. Straight across?

A. Well, not directly straight across. Almost straight.

Q. What became of that pin?

MR. MASON: We have got that.

By MR. DEMMING:

Q. What did you do with the pin? I mean the crew?

A. We left it with the engine.

Q. What part of the engine?

A. The upper part of it was in the tank. If I am not mistaken, the lower part would drop out and it was put on the front of the engine.

Q. Did you examine the other part of the coupling?

A. Yes, sir.

Q. The draw bar?

A. Yes, sir.

Q. What was the condition of that?

A. The draw bar was all right. The draw bar was intact.

Q. I think you said you did not examine the coupling or the air hose; you, personally?

A. No, sir. I did not examine it.

Q. You yourself do not know what caused that air hose to part, do you?

A. No, sir.

Cross-examination.

By Mr. Mason:

Q. At the point between the forty-fourth and forty-third car, where the air hose had parted, the cars had not separated?

A. No.

Q. The cars were coupled together?

A. They were coupled together, yes.

Q. And there were no couplings on that train had separated at all?

A. No, sir.

Q. Your caboose was at the tail of the train, was it?

A. Yes, sir.

Q. And when you went up to the front you found that the pin in the tank had been broken clean and the engine drifted away?

A. Yes, sir.

Q. In order to put the engine in on the siding you got the engine from the following train and coupled up and pushed it to Moore's Mill?

A. Yes, sir.

Q. Were you there when they coupled the engine up to the engine and pushed it in?

A. No, sir, I was not.

Re-direct-examination.

By Mr. Demming:

Q. What kind of a roadbed was it there?

A. Practically level at that point.

Q. I mean the composition. What kind of ballast was it?

A. It is an ash ballast.
Q. Ash ballast?
A. Yes, sir.
Q. Not small stones?
A. Well, ash and cinder ballast, I should say.
Q. Ash and cinder?
A. Yes.
Q. And do you agree with the preceding witness that the rear of the train was on one curve and the front on the other?
A. Yes.
Q. A compound curve?
A. Yes.

Re cross-examination.

By Mr. Mason:

Q. What kind of curves were they? Were they slight curves, or much of a curve?
A. They were not very sharp curves, and with forty-four cars the engine is around one as the caboose is coming around the other.
Q. Sort of a slight thin letter S?
A. Yes, sir.

Norman C. Shover, having been duly sworn, was examined and testified as follows:

By Mr. Demming:

Q. Where do you live?
A. Harrisburg.
Q. What street?
A. 348 Nectarine Street.
Q. What is your business?
A. Flagman.
Q. For what road?
A. Philadelphia & Reading.
Q. How long have you been a flagman?

A. Two years. I have been examined that long. I haven't been flagging that long.

Q. You have been a brakeman part of the time, have you?

A. Yes, sir.

Q. You were a flagman on this train where Pennel was killed?

A. Yes, sir.

Q. Where were you at time of the accident?

A. Sitting in the caboose.

Q. The conductor was there, and who else?

A. The brakeman.

Q. Which brakeman?

A. The middle brakeman.

Q. That is who?

A. Fessler.

Q. At the time of the accident, what was the first you knew about it?

A. The only thing I knew, the brakes went into emergency and I got off and the conductor and brakeman went up; I went back to protect the rear end.

Q. They went up to the engine?

A. They went up to the front end, yes.

Q. And you walked back to flag the following train?

A. Yes, sir.

Q. At that time did you know what caused the train to stop?

A. I did not.

Q. How soon after that did you find out?

A. I did not find out until the brakeman came back and told me.

Q. Which brakeman told you?

A. Fessler.

Q. What did you do then?

A. He came back and explained what they were going to do, to hold that engine up behind us and shove the train up to Huntsdale and pull it back on the east-

ern siding. He came back and told me to cut the engine off behind us and shove the train to Huntsdale and pull it down into the eastern siding to Moore's Mill.

Q. When did you know what was the cause of putting the air on the train?

A. After the brakeman came back and told me.

Q. He told you about it?

A. Yes.

Q. Then what did you do?

A. We coupled the air hose up between the first and second car from the rear end.

Q. You walked up to the last car and the next to the last car and looked in there, did you?

A. No, I did not look in there.

Q. Didn't you go up and look at it?

A. No; the brakeman coupled the hose up.

Q. You went up, too, didn't you?

A. No.

Q. Didn't you go up there?

A. No, sir.

Q. Didn't you look at that coupling on that air hose?

A. No, sir.

Q. You remember seeing me, don't you?

A. I remember seeing you.

Q. Didn't you tell me that you looked at the coupling on that air hose?

A. No, sir; you asked me if the air hose was worn. I said there may have been, and I said there may have been too much slack in the drawhead to cause it. That is the statement I gave you.

Q. Didn't you say the air hose was worn?

A. No, sir.

Q. And in your opinion the draw bar had too much slack there?

A. No. You said, "Was the air hose worn?" I said, "There may have been."

Q. You did not see the air hose yourself?

A. No; the brakeman coupled the air hose up—Fessler.

Q. Didn't you look at it yourself?

A. No, sir.

Q. That is what you say now?

A. That is what I do.

Q. You did not see that at all at any time?

THE COURT: He has said that seven times now, Mr. Demming. Do not ask him to say it any more.

By MR. DEMMING:

Q. Do you know what caused that air hose to part?

A. I do not.

Q. Where was that air hose put together?

A. At Moore's Mill; east of Moore's Mill.

Q. In the first case. Where was the train made up?

A. At Rutherford.

Q. There is where the air hose was coupled?

A. Yes, sir; there is where it was coupled, I guess, as far as I know.

Q. You did not see the coupling apparatus between the locomotive and the tender?

A. No, sir.

Q. You don't know what broke up there?

A. No, sir.

Cross-examination.

By MR. MASON:

Q. You said to Mr. Demming that the air hose was coupled up in the Rutherford yard?

A. Yes, sir.

Q. Who coupled it up, do you know?

A. I don't know. I don't mind whether they were coupled up or whether we coupled them up.

Q. When you got the engine from the train that was following you to couple up to the rear of your train, it was then pushed on ahead and put in on the siding at Moore's Mill, was it?

A. He pushed it up to Huntsdale and pulled it back on the eastern siding at Moore's Mill.

Q. About how far is Huntsdale, do you remember?

A. Well, it is about a mile, I guess, or more.

Q. Then you brought it back to Moore's Mill?

A. Yes, sir.

Q. When you pushed it and pulled it back was the air hose coupled up again?

A. Yes, the air hose was coupled up. Fessler coupled the hose up.

Q. While you were there?

A. No, I wasn't there at the hose.

Q. Were you on the train as it went up to Huntsdale and back again?

A. Yes; I was stationed about five or six cars up when he started to shove up.

Q. Was there any trouble with the air hose going up to Huntsdale and back to the siding at Moore's Mill?

A. No, sir.

Q. After the emergency was applied do I understand you to say that you got off the caboose and went back and did not make any examination of the train yourself?

A. No, I did not. I went back to protect the rear end.

Re-direct-examination.

By Mr. Demming:

Q. Where did you make an examination?

A. At Rutherford. Everything was O. K. leaving Rutherford.

Q. Then it was all coupled up?

A. Yes, sir; everything was coupled up leaving Rutherford.

Q. You did not couple the air up yourself?

A. I won't say whether I did couple it or not.

Q. You don't remember that?

A. I don't remember that.

Q. You said in answer to Mr. Mason that there was no trouble when the train backed on the siding with the air hose?

A. There was no trouble after it was coupled up and pushed up.

Q. The engine did not couple up the air hose, did it?

A. Sure. He had to couple the air to the cab and run through the train to shove the train up.

Q. Did the engine couple up to the air hose?

A. No, I coupled the air hose up on the engine, and the brakeman coupled it up between the first and second car. I stationed myself about five or six cars from the rear end and looked for a signal going around those curves.

Q. With the air hose coupled on, that engine then pushed the train on to the siding, didn't it?

A. It pushed it up and pulled it in the siding.

Q. That is, pushed it up until the engine got clear of the switch and then it came back on the siding with the train?

A. Ran it back in the siding, yes.

Q. You mean during that interval there was no further trouble with that air hose?

A. No, sir.

Re-cross-examination.

By Mr. Mason:

Q. When you said you had made an inspection at Rutherford, did you make an inspection yourself of the train before you took it out?

A. Me and the middle brakeman.

Q. You and Fessler?

A. Yes, sir.

Q. When the engine behind you came up and coupled up to the train to push it up to Huntsdale, I understood you to say that you coupled up the air hose

to the engine and Fessler coupled it up between these two cars?

A. Yes, sir.

CARL H. FESSLER, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. Vermoyne, Pennsylvania.

Q. Cumberland County?

A. Yes, sir.

Q. What is your business?

A. Brakeman.

Q. For the Reading road?

A. Yes, sir.

Q. Were you the brakeman on this train?

A. Yes, sir.

Q. What do you know about the accident?

A. Well, after leaving Rutherford, after inspecting our train, and making several haul stops along the road, the brakes went into emergency at Moore's Mill. At Moore's Mill the brakes went into emergency and we inspected the train there.

Q. Where were you at that time?

A. In the caboose.

Q. The first you knew, I suppose, was when the train began to stop?

A. Yes, sir.

Q. Then you went out to find out what was the cause for it?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Where did you go?

A. Went up along the right side of the train.

Q. Up to the engine?

A. Yes, sir.

Q. You found out what was the trouble up there, did you?

A. Yes, sir.

Q. I suppose you examined the coupling there and the broken knuckle between the engine and the tender?

A. Yes, sir, I did.

Q. Did you see what was broken?

A. Yes, sir.

Q. What was it?

A. The pulling bar pin on the tender.

Q. Did you look at the broken pin?

A. Yes, sir; I examined it.

Q. What did you do with the pin?

A. I threw it on the front of the engine—the lower part of it.

Q. Was that the last you saw of it?

A. Yes, sir.

Q. You don't know where it is now?

A. No, sir.

Q. That was an old-fashioned draw bar and pin, was it?

A. I think it was the latest.

Q. It was a draw bar and pin, anyway?

A. Yes, sir.

Q. What other couplings were on that train besides that draw bar and pin? What kind of couplings had the other cars and the tender and the locomotive itself?

A. I don't quite understand you.

Q. You say between the tender and the locomotive was the draw bar and pin coupling?

A. Yes, sir.

Q. What other kind of couplings were on that train besides that?

A. Different couplings.

Q. With regard to the draw bar and pin. Was there any other draw bar and pin coupling on that whole train beside that?

A. That was the only one.

Q. The others were automatic couplings, were they not?

A. Yes, sir.

Q. Was there any other coupling broken or given in the accident, with the exception of that draw bar and pin?

A. That is the only one I know of.

Q. You examined the whole train, did you not, and went under it?

A. Yes, sir.

Q. The conductor sent you back to couple up this air hose, did he not?

A. Yes, sir.

Q. What did you find when you got back there between the forty-fourth and forty-third cars?

A. We coupled the engine that was following us to our train, and after turning the air in from the engine I discovered there was an air hose parted between the next to the last and the last car.

Q. Was that the cause for the train stopping, the air going on the train?

A. I think it was.

Q. And that was the reason why the strain was put upon the locomotive, was it?

A. I think so.

Q. Which caused this pin to break?

A. Yes, sir.

Q. Did you look at that air hose?

A. Yes, sir.

Q. Did you put it together again?

A. Yes, sir.

Q. What was the condition of the couplings on that air hose?

A. O. K.; I think so.

Q. You think so?

A. Yes, sir.

Q. Were they worn?

A. No, sir.

Q. Did you examine them to ascertain whether or not they were?

A. No; I did not examine them closely.

Q. You did not examine them closely?

A. No, sir.

Q. You don't know whether they were worn or not?

A. I don't think they were.

Q. You did not examine them to ascertain?

A. No, sir.

Q. You coupled them up and then went away?

A. Yes, sir.

Q. Was there absolutely any explanation around there why that air hose should come apart that you saw?

A. No, sir.

Q. Did you look at the draw bars on the couplings on those two cars?

A. No, sir; I did not.

Q. You did not examine them?

A. No, sir.

Q. Did anybody else do it, that you know of?

A. No, sir.

Cross-examination.

By Mr. Mason:

Q. As I understood you to say to Mr. Demming, you made an inspection of your train before you left Rutherford?

A. Yes, sir.

Q. What part in the inspection did you play? What did you do?

A. I examined the front part of the train.

Q. What was your inspection? What did you do?

A. Well, we looked over the air hose and the coupling.

Q. From the time you left Rutherford until the

time of the accident was there any trouble at all with the air hose or couplings anywhere?

A. No, sir.

Q. After you coupled up the engine that came up to the rear of the train and started the air in from the engine, I understand that you saw it escaping from between the car next to the caboose and the car in front of that?

A. Yes, sir.

Q. Then who went up and coupled up that air hose? You?

A. I did.

Q. In making the coupling of that air hose was there anything about the coupling that indicated anything wrong with it?

A. No, sir.

Q. After it was coupled up, what was done with the air from the engine?

A. Turned into the whole train.

Q. Turned into the whole train except the engine of your train?

A. Yes, sir.

Q. Then what was done with your train?

A. It was shoved to Huntsdale. From there it was pulled in the eastern passing siding.

Q. During the time that it was taken to Huntsdale and brought back to the siding at Moore's mill, was there any trouble with the air at all?

A. No, sir.

Q. Any trouble with any of the couplings on the train?

A. No, sir.

Re-direct-examination.

By Mr. Demming:

Q. That is, during the time that this engine was putting on freight on the siding there was no further trouble with the air hose? That is what you mean, is it not?

A. Yes, sir.
Q. That is all you know about it?
A. Yes, sir.

Arthur P. Hensel, having been duly sworn, was examined and testified as follows:

By Mr. Demming:

Q. Where do you live?
A. Harrisburg.
Q. What street?
A. 44 Balm Street.
Q. What is your business?
A. Brakeman?
Q. On the Reading road?
A. Yes, sir.
Q. Were you brakeman of this crew when Pennell was killed?
A. Yes, sir.
Q. Tell us what you know of the accident.
A. Well, I was on the left-hand side of the engine, and the first thing I felt the brakes applying, and I turned around and saw the tank swaying away from the engine, and then I heard the engine man release and ran away with the engine. When the engine came to the siding he held his engine and I got off and found the man.
Q. Did you see Pennell at all at the time of the accident?
A. Afterwards.
Q. You saw him afterwards?
A. Yes, sir.
Q. You did not see how he fell in between?
A. No, sir.
Q. The engine parted at the place where he was standing, didn't it?
A. I judge he was there, yes, sir.
Q. That was his place, as a fireman?

A. Sure; yes, sir.

Q. You were in the cab of the engine itself at the time?

A. Yes, sir.

Q. Riding on the opposite side from the engineer or on the same side?

A. On the opposite side. On the left hand.

Q. Could you tell from that position whether or not the engineer put the air on?

A. Yes, sir; I could.

Q. Did he do it or not?

A. He did not.

Q. Was the air coupled up to the engine at the time of the accident?

A. Well, it sheared away when the accident occurred.

Q. Did you just proceed on?

A. Yes, sir; certainly.

Q. Could you tell whether or not when the air went on the rest of the train, whether it went on the engine too?

A. When it went on the rest of the train?

Q. Yes. Whether it went on the wheels of the engine at the same time?

A. Certainly; yes, sir.

Q. And yet the engine pulled away?

A. Well, he had released it.

Q. He released the air?

A. Sure.

Q. You saw this gap appearing between the engine and the tender?

A. Yes, sir.

Q. And the air was on the engine at the same time?

A. He released it then.

Q. He released it afterwards?

A. Sure.

Q. Did you go back?

A. Yes, sir.

Q. Did you examine this coupling between the engine and the tender?

A. No, sir.

Q. You did not examine it to see what broke?

A. No, sir.

Q. You don't know what broke?

A. I know what broke, certainly.

Q. What was it?

A. The coupling pin.

Q. A big coupling pin, was it?

A. Yes, sir. The pulling bar pin.

Q. Did you examine that break?

A. No, sir; I did not.

Q. You don't know what kind of a break it was?

A. No, sir.

Q. Did you go back to see this air hose between the last car and the next car to it?

A. No, sir.

Q. You did not see that at all?

A. No, sir.

Q. Do you know who did see that?

A. I don't know anything about that back there, the rear of the train.

Q. Do you know who coupled the cars in the first instance in the Rutherford yards?

A. No, sir; I do not.

Q. They were the same cars that you started with from Rutherford, were they not?

A. Yes, sir.

(No cross-examination.)

M. F. Wise, having been duly sworn, was examined and testified as follows:

By Mr. Demming:

Q. Where do you live?

A. 327 Cresson Street, Harrisburg.

Q. What is your business?

A. Wreck master.

Q. You are the foreman of the wreck crew?

A. Yes, sir.

Q. Do you remember the date of this accident?

A. Yes, sir.

Q. You went down there with the wreck train?

A. Yes, sir.

Q. When you went down there what did you see and what did you do?

A. We found the train on the eastern siding, and we got the engine at the western end of the western siding, and we backed it up and got the tender at the western end of the eastern siding, and coupled it up, and came to Moore's Mill, and we got word to come back and examine the air hose on the last two cars. So we went on up through the eastern siding, and coupled up the rear of the train with our engine, and tried the air on those last two cars, and set the brakes and they worked all right. Then we stretched them up to see if there was any trouble with the couplers, and I noticed when the coupler pulled apart that there was a pin broken. We stretched the couplers apart to see if there was any trouble, anything in the yokes or anything, and we didn't see anything.

Q. You did not see anything?

A. No, sir.

Q. At that time when you tested them, how much air was in there on the cars?

A. The train line pressure is 70 pounds.

Q. Do you know whether or not those reservoirs had been filled up?

A. Well, we waited about five or seven minutes, I suppose, anyhow.

Q. You waited that time?

A. Yes, sir.

Q. And you coupled them up?

SPOTS ON PAGE

A. Yes, sir.

Q. You looked at those couplings of the air hose, did you?

A. Yes, sir. I coupled those myself.

Q. Is it not true that one or both of them were worn?

A. No, sir; not to my recollection.

Q. Just take one of them. Was not one of them worn?

A. No, sir. No leak at all whatever.

Q. I am not talking about a leak. But from your eyesight, before you coupled them up.

A. No, sir. I did not see any defect of any kind.

Q. Did you examine them to find out whether or not they were worn?

A. Well, not any more than coupled them up. I picked one up with my right hand and one with the left, and coupled them together, the same as we do.

Q. Was not one of them worn?

A. No, sir; not to any extent at all.

Q. Well, to some extent it was worn?

A. Yes.

Q. It was worn?

A. But there were no holes or anything worn in it. It was all practically a new hose.

Q. I am not talking about the hose. I am talking about the coupling part itself.

A. The connection part?

Q. Yes.

A. No. I did not notice any defect.

Q. You did not notice that?

A. No. There was no leak of any kind, and I worked them up and down to see if there was anything.

Q. But one of the couplings was somewhat worn?

A. Yes, sir. That had been on for some time.

Q. Do you know what it was that was worn? Was it not the collar that was worn?

A. No, sir.

Q. Which part was it?

A. Well, I mean the air hose had been worn some months, you know.

Q. I am speaking about the couplings.

A. Oh, the couplings?

Q. Yes.

A. No. I did not notice any wearing about them.

Q. Didn't you notice that one of those couplings was worn?

A. No, sir. I saw no air leaking or anything that I saw.

Q. You are speaking about when you coupled them together, and then you stood and listened to hear if there was any air?

A. Yes, sir; and worked them up and down to see if there would be any side play, and I did not find any.

Q. Before you put the couplings together, did you look at the coupling parts at all?

A. Yes, sir. The gaskets?

Q. Yes.

A. Yes; the gaskets.

Q. Was not one of those couplings worn around the collar?

A. Not to my recollection.

Q. Do you remember distinctly or not?

A. Yes, sir.

Q. What did you mean awhile ago when you said one of them was worn?

A. Well, that had been on for some time. One had been. I don't know how long. I did not look to see the date or anything.

Q. Was that a Westinghouse or a—

A. No, sir; I did not notice that.

Q. You did not notice that?

A. No, sir; I did not notice what the name was, or anything of that kind.

Q. You coupled them up, and you did not hear anything escaping?

A. No, sir.

Q. Is that a fair test, to couple them up, and then just listen?

A. Yes, sir. I worked them up and down to see if there was any play.

Q. Shouldn't you put in soapsuds or hold a torch-light up to make a full test?

A. You do that in the shop, when you connect the joints together.

Q. Is that the regular road test?

A. Not to my recollection, no.

Q. You did not test it that way?

A. No.

Q. You simply tested it by sound?

A. Yes, sir.

Q. That is right?

A. Yes, sir.

Q. It is an ash roadbed there, is it not?

A. Yes.

Q. And a level track?

A. Yes.

Q. Did you examine the drawbars on those two cars?

A. No. I was walking up there to get the engine and this tender, and I noticed they had squeezed the engine together. There was no wear, or anything. There was not much slack between the engine and tender, because we had to shove the bumpers together to get the pin down.

Q. I do not mean between the engine and tender. I mean between those two cars where the air hose was.

A. No.

Q. You did not examine those drawheads?

A. Yes. I looked at the ones—

Q. The drawheads?

A. The drawheads. Any more than the knuckles were worn on one, and the pin was broken in one coupler.

Q. The pin was broken?

A. Yes, sir. There was a pin broken. The pin was found back on the road.

By The Court:

Q. You are talking of the pin up at the engine?

A. No. That car coupling pin. The drawhead pin.

By Mr. Demming:

Q. That is in an automatic coupler?

A. Yes, sir.

Q. Did you examine the drawheads of those cars to see if there was any unusual play there?

A. Play, you mean, between the knuckles?

Q. Yes. So as to extend the space between the cars when they were in motion?

A. No. We did not pull it too far.

Q. Did you examine it?

A. Yes, sir. We stretched it up with our engine, the whole train. They were very good cars.

Q. Then you left them alone?

A. Yes, sir.

Cross-examination.

By Mr. Mason:

Q. As I understand it, you yourself made an examination of this air hose between these two cars?

A. Yes, sir. I was standing between the two cars.

Q. And you coupled them up?

A. Yes, sir.

Q. And you moved them up and down to see the play?

A. Yes, sir. Two or three times.

Q. Before the engine was coupled up and the air was turned into the whole train?

A. No. Just those two cars.

Q. After you got the full air line pressure, the regular 70 pounds pressure, put on those cars, you stretched them to see the play?

A. Yes, sir; and to see whether there would be any effect or any trouble.

Q. And there was no unusual play between the two couplers?

A. No, sir.

Q. Not enough to cause any trouble at all with the air hose?

A. No, sir; not at all.

Q. The air hose retained its position after that test was made?

A. Yes, sir.

Q. Did you go with the train up to the siding, or was the train on the siding when you got there?

A. The train was on the siding.

James E. Mellon, having been duly sworn, was examined and testified as follows:

By Mr. Demming:

Q. What is your business?

A. Mechanical engineer.

Q. Just tell the Court and jury what experience you have had as a mechanical engineer.

A. My first experience consisted in an apprenticeship in a machine shop, to learn the machinist's trade, the Nixon Locomotive Company in Scranton. I was promoted from the shops to the drawing office, and after my apprenticeship I left the Nixon Company and went to work for the Lackawanna Railroad. I was with them in the capacity of a draftsman, chief draftsman, and mechanical engineer for a period extending over twenty years.

Q. Were you investigator for them of wrecks?

A. Yes, sir.

Q. The causes of wrecks and things of that sort?

A. Yes, sir.

Q. Where are you now?

A. With the American Engineering Company, in this city.

Q. Are you acquainted with couplings of air hose and couplings between cars, railroad cars, and locomotives and tenders?

A. I am.

Q. Will you describe the parts of couplings between air hoses.

(Couplings produced.)

A. These are the couplings of the air hose.

Q. Just demonstrate how that works.

(Witness demonstrated couplings.)

A. The gaskets, which prevents the air from escaping, are set in grooves inside of this casing.

Q. Gaskets are pieces of rubber?

A. Yes, sir.

Q. To make them hold tight together?

A. Yes, sir.

Q. And the rubber hose is attached?

A. Rubber hose is attached to the ends and extends from this point here (indicating) to the cars on each side.

Q. Those couplings are at the lowest point on the loop of the hose?

A. Yes, sir.

Q. Hanging between the ends of the cars?

A. Yes, sir.

Q. Just demonstrate to the Court and jury how those are coupled, in what position you have got to bring the hose to couple them.

(Witness again demonstrated coupling.)

A. Slightly above a horizontal plane. Just about say five degrees.

Q. In other words, in order to get those couplers coupled, you have got to bring them up like this (indicating) and couple them, and then you drop them down?

A. Drop them down into position.

Q. And they remain in that position down below?

A. Yes, sir. They are held together by the elasticity or the compression of the rubber, acting upon these flanges on the inside of the lugs.

Q. How is it possible—under what conditions is it possible for that air hose to come apart after those couplers have once been coupled and while the train is in motion?

A. It is possible to come apart by vulcanizing of the rubber, and drying out they become hardened and shrink. So that the thickness of the gaskets decreases, and while the surface may remain tight and the air not escape to any appreciable extent, still the thickness of the gaskets decreases, and allowing the slackness to occur between the flanges, making them more liable to come apart. Then, these flanges become worn through use and abuse. By "abuse" I mean that conductors and trainmen, not caring to get on their knees between the cars to uncouple these knuckles, frequently they will lift the coupling and signal the engineer to go ahead and force those things apart by the cars separating. That wears and damages these flanges, and each time that these are separated the knuckles receive some damage, until in time it becomes very susceptible to separation by any vibration or the breaking of the draw-bars between the cars.

Q. Is it possible for that air hose coupling to come apart if it is in good condition?

A. I cannot see that it would, if it was in good condition, unless, as I described, the coupler was lifted out and the train separated.

Q. What coupler do you mean was lifted out?

A. The couplers of the train. The drawheads. When they become worn they are susceptible to coming apart, with some slight disturbance.

Q. With a slight disturbance?

A. Yes, sir.

Q. If there was excessive play in the drawheads of the coupling apparatus on the cars, would that have any effect on them coming apart?

A. That would tend to separate them, if they were not worn.

Q. You heard of the manner in which this accident occurred, described by the witnesses?

A. I did.

Q. If those coupling parts were in good condition, could they possibly have come apart in your opinion in that accident?

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

Q. Is one of those couplers that you have in your hand there worn?

A. It is, to some extent.

Q. The gaskets in those couplers that you have there are absolutely new?

A. The gaskets are new.

Q. Those were just put in there?

A. Yes, sir.

Q. Are the other parts worn outside of that?

A. Yes, sir.

Q. And that is what you mean by the worn part of the coupling, which would allow it to come apart?

A. Yes, sir.

Q. Could those couplings come apart in any other way possibly with that coupling properly hanging down and the train in motion, unless they were worn, or unless there was excessive play in the drawheads of the coupling?

A. I can conceive of a condition where they would come apart. If they were struck a violent blow at the bottom, throwing them up in the air. But that is a mighty unusual condition.

Q. Is that likely or probable along a railroad track?

A. No, it is not.

Q. Outside of that, that is the only possible exception you can think of?

A. That is the only exception I can think of.

Q. Putting those aside for the moment, are you familiar with the drawbar in the coupling apparatus between the engine and the tender?

A. Yes, sir.

Q. Is it any part of a fireman's duty to inspect that or to know anything about it?

A. No, sir; it is not.

Q. Is it any part of a fireman's duty to inspect or know about the couplings of an air hose?

A. No, sir.

Q. At the present time is or is it not proper practice to have simply the drawbar and coupling between the engine and tender?

(Objected to.)

THE COURT: You have not laid a proper foundation for any such question as that.

By MR. DEMMING:

Q. Is or is not the drawbar and the pin the only connection at the present time required between the locomotive and the tender?

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

Q. Is or is it not proper to have as the only connection between the locomotive and the tender the drawbar and the pin?

(Objected to.)

(Objection sustained.)

Q. Are you familiar with the connections in use at the present time on railroads between locomotives and tenders?

A. I am.

Q. What are those connections?

MR. MASON: Let us have his experience a little bit more definite.

By MR. MASON:

Q. What has been your experience in inspecting such connections?

A. In designing of locomotives for twenty years; in inspection of locomotives at Baldwin's, Dunkirk, and Schenectady.

Q. For what roads?

A. For the Lackawanna railroads.

Q. No other railroad?

A. No.

Q. Then all you would testify to would be what was the custom on the Lackawanna Railroad?

A. Well, as far as the application of different devices is concerned, I am familiar with what other roads use, through my studies and through an examination of locomotives being built for other roads in these different shops.

MR. MASON: I am perfectly willing to have him answer that question, with that qualification.

By MR. DEMMING:

Q. You are thoroughly familiar with the methods adopted on all roads, are you not, in the east?

A. Yes, sir.

Q. Will you tell us what those methods are?

A. In addition to the drawbar, they have on some roads, namely, the Pennsylvania, two additional or supplemental drawbars, what are called radial bars, one on each side of the main or central drawbar, separate, so as to accommodate the curving of the locomotive around curves. Those two bars are of smaller di-

ameter than the pin and the main bar, and are arranged so that the two pins on the supplemental drawbars or radial bars are about half of the area of the main pin. On other roads it is almost standard practice, instead of the radial or supplemental drawbars, to use chains, chains secured to the back heads or frame heads of the locomotive, and hooked in with hooks into the I-bolts through the sills of the tenders, one on each side of the center.

Q. What is the purpose of those chains and radial bars?

A. In case of the failure of the main drawbar, that they will take up the shock and prevent the separation of the engine and tender.

Q. In case of the failure of the main drawbar and pin?

A. Yes, sir.

Q. You are counting the pin connecting the drawbar as part of the main coupling apparatus?

A. Yes, sir.

Q. They should be sufficient to hold them together if main drawbar gives?

A. That is correct.

Q. You say they are called safety chains for that purpose, I suppose?

A. Safety chains.

Q. Which are the stronger, the automatic couplings or the drawbar and pin?

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

Q. You have heard it testified here that when the wreck crew got to this point and examined these cars that the foreman of the wreck crew put the two coupling parts together of the air hose and listened to hear if there was any air coming out, and because he did not

hear any he thought they were in good condition. Is that a fair test?

MR. MASON: I object to that. That is not all he said. That is not a fair representation of what the wreck master said.

THE COURT: No; it is not.

By MR. DEMMING:

Q. You heard the testimony of the foreman of the wreck crew?

A. Yes, sir.

Q. Will you tell us, to determine whether or not those couplings were in good condition, whether or not that was a proper test?

(Objected to.)

(Objection sustained.)

Q. As I recall the facts, the wreck master testified that he came there and he put the ends of this air hose together, and he stood there and listened to hear if any air was escaping and he did not hear any air. Now, would that be a fair test of that coupler?

(Objected to.)

(Objection sustained.)

Q. Do you recall hearing the wreck master say he tested it in any other way except that?

(Objected to.)

(Objection sustained.)

Q. I am reminded that the wreck master testified that when he came there the train was on the siding; that he put the air hose together, and he waited there for seven minutes, and he heard no air escaping. Would that be a fair test?

(Objected to.)

THE COURT: I really shall not rule on that any more, Mr. Demming.

(Exception noted for plaintiff by direction of the Court.)

By Mr. Demming:

Q. What would be a fair test to determine whether or not that coupling between the cars was in proper condition?

(Objected to.)

(Objection overruled.)

A. As recommended by Westinghouse and other air brake companies, and as used on nearly all roads, if they want to determine whether the air is escaping. That is the use of a torch or soap suds, placed around the coupling. If the air is escaping the air will force soap bubbles up through the gasket, or by the use of the torch, if the air is escaping it will blow the flame off at right angles.

Q. Can you trust to your ear alone to determine whether or not it is?

A. No, sir; you cannot.

Cross-examination.

By Mr. Mason:

Q. You have given us an expert opinion as to the proper test. Did you ever know of a soapsud test being applied by a member of a crew putting the air hose together that had come apart, before he started his train again?

A. I have known of tests to be made by air brake inspectors.

Q. But after an air hose had come apart on a train that was on the road to its destination, did you ever know of the test that you have referred to being applied before the starting of the train?

A. After a separation on the road?

Q. Yes.

A. No; I did not.

Q. It is done in the shops where they have facilities for making those tests?

A. It is done on the road at inspection points.

LAWRENCE WEBER, having been duly sworn, was examined and testified as follows:

By MR. DEMMING:

Q. Where do you live?

A. East Riverton, New Jersey.

Q. What is your business?

A. Locomotive engineer.

Q. What roads have you been employed by?

A. Pennsylvania Railroad.

Q. Are you familiar with the couplings on air hoses?

A. Yes, sir.

Q. Will you tell us after the air hose is once coupled between cars and the train starts out on the road, under what conditions it is possible for that air hose to part?

MR. MASON: I should like to have the privilege of cross-examining this gentleman.

By MR. MASON:

Q. You say that your capacity in service has been that of an engineer?

A. Yes, sir.

Q. As an engineer for what road?

A. Pennsylvania.

Q. Are you employed there now?

A. No, sir.

Q. When did you leave?

A. I left in 1911.

Q. How long were you employed as an engineer?

A. In the neighborhood of eight years.

Q. What were your duties as an engineer, insofar as they related to air hoses?

A. All the duties appertaining to air.

Q. As an engineer was it your duty to inspect the air hoses on the train?

A. Yes, sir; on the engine. With the same couplings.

Q. The same couplings?

A. Yes, sir.

Q. The air hose on the engine is where?

A. On the front of the engine and on the back of the tender, and also between the engine and tender.

Q. On the front of the engine?

A. On the front of the engine.

Q. And between the engine and tender?

A. Yes, sir.

Q. And at the rear of the tender?

A. Yes, sir.

Q. You say it was your duty to inspect that air hose?

A. Yes, sir; and all couplings of air hose on the engine.

By Mr. Demming:

Q. Before you were an engineer, what were your duties on the railroad?

A. Fireman.

Q. Before that what were you?

A. A brakeman.

Q. During those different employments did you come in contact with air hoses and couplings?

A. Yes, sir.

Q. Did you have experience with them?

A. Yes, sir.

By Mr. Mason:

Q. Was it your duty as a fireman to inspect the hose also?

A. No, sir; I made it a habit, for my own knowledge.

Q. That is to say, you did something that the other firemen were not accustomed to doing?

A. Yes, sir. It was just only for my own benefit that I did it.

By Mr. Demming:

Q. As a brakeman was it your duty?

A. Yes, sir.

Q. After the air hose is once coupled between cars, and the train starts out, running along the road, under what conditions is it possible for that air hose to come apart?

A. Well, there are a few ways for that air hose coupling to come apart; namely, by wearing of couplings, and also slackage in the drawhead, and also going around curves where the air hose would be a little short, and that would cause them to separate.

Q. If they were too short?

A. Yes, sir.

Q. Those conditions that you have mentioned—you have mentioned three—are they normal conditions or defects?

A. Well, two of them are normal conditions, and one is a defect.

Q. What do you mean by a normal condition?

A. A normal condition is one that you are very likely to find in a coupling at most any time, which would cause the air hose coupling to separate.

Q. That is a defect in the air hose coupling, then?

A. Yes, sir.

Q. There must me a worn condition of the coupling part, or too much play in the drawheads of the couplings between the cars, or the hose too short?

A. Too short or coupled under the car too far.

Q. If the couplings on the air hose are in normal condition, or are proper, without any wearing, and they are properly coupled, and there is no give in the drawbars, is there any possible way by which they could come loose?

A. No, sir.

Cross-examination.

By Mr. Mason:

Q. I understood you to say that the play between the couplers might cause the air hose to come apart?

A. Yes, sir.

Q. That would be only where the air hose was only so short that when the cars separated it would pull the coupling of the air hose apart, would it not?

A. No, sir. Running on grade it would uncouple.

Q. I do not understand you, then. What do you mean when you say the play between the couplers would be such as to uncouple the air hose?

A. It would mean that if the two draw head couplings had a certain amount of play in there, one of the two of them, would cause enough give there to make that air hose uncouple itself.

Q. That is, if the give was enough to be a strain on the air hose?

A. Yes, sir.

Q. You heard Mr. Mellon testify that the way the air hose hangs, in a sort of a half loop down below, a blow, if it were hard enough on that, would knock it up enough to uncouple the air hose. Do you agree with that?

A. No, sir.

Q. You do not think Mr. Mellon's testimony is correct on that?

A. No, sir. The brake riggings would clear the object out of the road before it would come in contact with it.

Q. I am not asking if you ever saw an object hit it. I am asking you whether you agree with Mr. Mellon's statement that if there were something that did hit it, it could uncouple the air hose?

A. I could never say I ever saw that.

Q. Do you say it is so? Would a blow on that air hose uncouple it?

A. From underneath?

Q. Yes.

A. No, sir.

Q. Isn't that the way the air hose is uncoupled? It is lifted up and then uncoupled?

A. Yes, sir; with the pressure taken off.

Q. And if there was a blow that lifted it up, wouldn't it uncouple, as Mr. Mellon said it would?

A. Not with the pressure on it. That is, if the train was going on its regular gait or on movement.

Q. You have never seen it happen?

A. No, sir.

Q. Will you say that it could not possibly happen, as Mr. Mellon said it could?

A. No; I could not say.

Q. You could not answer that question?

A. I could not answer that question.

Re-direct-examination.

By Mr. Demming:

Q. If the coupling parts are worn, as you have described, just illustrate to the court and jury how those things will come apart, without having to move far?

A. Here is a bar, I think, slightly worn, with new gaskets in. There is not very much trouble at all to separate them.

(Witness uncoupled couplers.)

The Witness: That has two new gaskets.

Q. You are not lifting these up far, are you?

A. No, sir. I have not lifted them more than an inch.

Q. That is due to the worn condition of that coupler?

A. That is due to the worn condition of this one coupler.

Mr. Mason: Please try that again.

(Witness coupled and uncoupled couplers.)

By Mr. Demming:

Q. Of course, you are not exerting nearly as much strength as the train would pulling on it?

A. No, sir, and I am sick at the present time; not in health.

Plaintiff Rests.

Defendant's counsel moved for binding instructions.

Defendant offered no evidence.

Counsel for defendant and plaintiff argued the case to the jury on behalf of the respective parties.

Adjourned until Tuesday, April 16th, 1912, at 10 o'clock a. m.

Philadelphia, Pa., Tuesday, April 16, 1912, 10 a. m.

Present: Parties as before noted.

CHARGE OF THE COURT.

Hon. John B. McPherson, *J.*

Gentlemen of the jury: I have no doubt you all are aware of the fact that in actions of this kind, based upon a charge of negligence, it is the duty of the plaintiff to establish negligence. It does not follow merely because an accident has happened and some one has been injured that the person charged with responsibility is obliged to bear it, because if he has not been at fault, of course, he cannot be obliged to bear the misfortunes that have fallen upon another person. There are accidents that are unexplained, as our experience almost every day teaches us, the burden of which must lie just where it happens to fall. The only way in which such a burden can be transferred from the shoulders

of one person to another is because the other has been at fault, and, therefore, the rule in the Courts, and the rule of common sense is that where one person charges another with liability for an injury it must be proved. Now that is the rule here in this case. Of course, the very first question in every such case is whether there is evidence upon that subject which would support a finding that the charge has been made out. Now I have had these notes copied, and they were put in my possession last evening, and I have very carefully examined them, and, as it is my duty to do, in the first instance I am bound to say whether I think there is evidence in the case to support the charge of negligence that is contained in the plaintiff's case. All I can say to you, and I need not trouble you with the details upon that subject, is that I find nothing in the case to justify the charge of negligence, that would justify me in submitting it to the jury. It seems to me, as far as I can make out from what has been offered in the case, an unexplained accident, one for which there is no account that would support the charge of negligence made against the defendant company, and it, therefore, becomes my duty to instruct you to render a verdict in favor of the defendant.

(Exception noted for plaintiff to the direction of the Court to the jury to render a verdict in favor of the defendant, by direction of the Court.)

The jury rendered a verdict in favor of the defendant.

And thereupon, the counsel for the said Mary G. Pennell, Adm., plaintiff, did then and there except to certain rulings of the Court and to the aforesaid charge and opinion of the said Court, and inasmuch as the said rulings and charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said Mary G. Pennell, Adm., plaintiff, did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the plaintiff did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 18th day of May, 1912.

JOHN B. MCPHERSON, (L. S.)
Judge.

MOTION AND REASON FOR NEW TRIAL.
Filed Apr. 19, 1912.

Counsel for the plaintiff hereby moves for a new trial in the above case, this, the 19th day of April, 1912, and assigns in support thereof the following

REASON:

The learned Trial Judge erred in directing the jury to bring in a verdict for the defendant.

GEORGE DEMMING,
Counsel for Plaintiff.
April 19, 1912.

OPINION.
Filed May 10, 1912.

MOTION FOR NEW TRIAL.

MCPHERSON, *Judge.*

That a locomotive engine—that is, the whole engine—is a "car", was decided in Johnson vs. Railroad Co., 196 U. S. 1; and it was accordingly held, that the rear

end of the tender, where the train is attached, must be equipped with an automatic coupler. But no decision has been cited that requires an automatic coupler between the engine proper and its tender, and there seems to be no reason for requiring it at that point.

I have read again the notes of testimony, and am still unable to find any evidence of the defendant's negligence. No presumption of fault exists in this class of cases; the doctrine of *res ipsa loquitur* does not apply; and in the absence of evidence all that can be said is that the liability of the defendant for this deplorable accident was not proved.

The motion for a new trial is refused.

PRAECIPE FOR JUDGMENT.
Filed May 21, 1912.

To Clerk of U. S. District Court:

Enter judgment upon the verdict in favor of the defendant in above case.

WM. CLARKE MASON,
Counsel for Defendant.

JUDGMENT.
Filed May 20, 1912.

Before McPHERSON, *J.*

And now, to wit, this 20th day of May, 1912, in accordance with praecipe filed, judgment is hereby entered on the verdict in the above entitled case in favor of the defendant and against the plaintiff.

BY THE COURT.
Attest:
LEO A. LILLY,
Deputy Clerk.

ASSIGNMENTS OF ERROR.
Filed May 29, 1912.

And now this, the 20th day of May, 1912, plaintiff, through her counsel, assigns as error the following:

1. The learned trial Judge erred in directing the jury to find a verdict for the defendant.

2. The learned trial Judge erred in refusing to allow the following question to be put by plaintiff's counsel and answered (page 64):

> Q. If those coupling parts were in good condition, could they possibly have come apart, in your opinion, in that accident?
>
> (Objected to.)
>
> (Objection sustained.)
>
> (Exception noted for plaintiff by direction of the Court.)

3. The learned trial Judge erred in refusing to allow the following question to be put by plaintiff's counsel and answered, and to allow plaintiff's witnesses to go into the following line of testimony (page 67):

> Q. Which are the stronger, the automatic couplings or the drawbar and pin?
>
> (Objected to.)
>
> (Objection sustained.)
>
> (Exception noted for plaintiff by direction of the Court.)

GEORGE DEMMING,
Atty. for Plaintiff.

PRAECIPE SUR TRANSCRIPT.
Filed May 29, 1912.

To the Clerk of the United States District Court,
Eastern District of Penna.:

Sir:

In making up the transcript sur writ of error in the above entitled case you are to include the following papers:

Docket Entries,
Writ of Error,
Statement of Claim,
Plea,
Bill of Exceptions,
Motion for New Trial,
Opinion,
Judgment,
Assignments of Error,

and no others.

GEORGE DEMMING,
Atty. for Plaintiff.
5-29-12

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *sct.*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of pleas and proceedings in the case of Pennell v. Philadelphia & Reading Railway Company, No. 1734, December Session, 1911, as per praecipe filed, a copy of which is annexed hereto, now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 14th day of June, in the year of our
(SEAL) Lord one thousand nine hundred and twelve, and in the one hundred and thirty-sixth year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court, U. S.

In the United States Circuit Court of Appeals for the Third Circuit.
October Term, 1912.

No. 1646 (List No. 62).

MARY GENEVIEVE PENNELL, Adm'x, Plaintiff in Error,
vs.
PHILADELPHIA & READING RAILWAY CO., Defendant in Error.

And afterwards, to wit, on the Fourth day of December, 1912, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, Circuit Judges, and Hon. John Rellstab, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-seventh day of January, 1913, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit.
October Term, 1912.

No. 1646.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased, Plaintiff Below and Plaintiff in Error,
vs.
PHILADELPHIA & READING RAILWAY COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray and Buffington, Circuit Judges, and Rellstab, District Judge.

BUFFINGTON, *Circuit Judge:*

In the court below, the plaintiff, Mary G. Pennell, brought suit under the provisions of the acts of April 22, 1908, and April 5, 1910, relating to the liability of interstate common carriers by railroads to their employees in certain cases, against the Philadelphia & Reading Railway Company, to recover damages for its alleged negligence, causing the death of Jay Allen Pennell, her husband and its employee. While working as a fireman on a locomotive of the defendant company hauling a freight train in interstate commerce the forward part of the engine broke loose from the tender and Pennell, who at the time was standing above the coupling, fell on the

track, was run over and killed. The negligence charged was an alleged violation by the railroad of the act of Congress of March 2, 1893, which, plaintiff contended, required it to place automatic couplers between the forward end of a locomotive and its tender. The act provides: "It shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." In Johnson vs. Southern Pacific Company, 196 U. S. 16, the word "car" was held to include a locomotive and that a railroad was bound to equip engines with automatic couplers, "since engines have occasion to make couplings more frequently" than cars. On the theory that the effect of that decision is to hold "that the engine is a car and that the tender is a car, each separate and apart from the other," it is now contended that when these parts are coupled together to form a locomotive, it must be by an automatic coupler. We cannot agree to such a construction. To do so would be to lose sight of the real purpose of the act. The law was not passed to secure stronger car couplings, for the old-fashioned link and pin were, when once made, and considered solely as couplings, possibly stronger and more reliable connections than automatic ones. It was the constant killing and maiming of men incident to going between the bumpers to couple and uncouple cars that the law sought to avoid and not to ensure the stability of the coupling after it was made, much less the stability between the parts of a locomotive itself. If the instability or insecurity of couplings after they were made had also been a recognized evil, and if Congress had meant to remedy such evil, the requirements of the act would have extended not merely to the automatic character of the couplings, but also to their strength and durability. The union of engine and tender is in large measure a permanent one, and the act of joining the two is of such rare occurrence and is so alien to transportation, and an accident resulting from the joining of such parts so unheard of, that Congress could not have had it in view to require an automatic coupler at that point.

Agreeing, as we do, with the conclusion reached by the court below, that "no decision has been cited that requires an automatic coupler between the engine proper and the tender, and there seems to be no reason for requiring it at that point," the judgment is affirmed.

Endorsed: No. 1646. Opinion of the court. Received and Filed January 27, 1913. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit
October Term, 1912.

No. 1646 (List No. 62).

MARY G. PENNELL, Plaintiff in Error,
vs.
PHILADELPHIA & READING RAILWAY CO., Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be considered on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and submission of briefs by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

JOHN B. McPHERSON,
Circuit Judge.

Philadelphia, January 27, 1913.

Endorsed: No. 1646. Order affirming judgment. Received and Filed January 27, 1913. Saunders Lewis, Jr., Clerk.

In the Supreme Court of the United States.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased, Plaintiff in Error and Plaintiff Below,
vs.
PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania, Defendant in Error and Defendant Below.

Assignment of Errors.

And now comes Mary Genevieve Pennell, Administratrix of the Estate of Jay Allen Pennell, Deceased, plaintiff in error, and makes and files this her assignment of errors:

First. The Circuit Court of Appeals for the Third Circuit erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania on the verdict entered on the twentieth day of May, 1912, in favor of said defendant in error and against said plaintiff in error.

Second. The said Circuit Court of Appeals erred in not reversing the said judgment of the said District Court, and in not remanding said cause to said District Court for a new trial.

Third. The said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause, said assignment of error being as follows:

"The learned trial judge erred in directing the jury to find a verdict for the defendant."

Fourth. The said Circuit Court of Appeals erred in not sustaining the second assignment of error upon the record in said cause, said assignment of error being as follows:

"The learned trial judge erred in refusing to allow the following question to be put by plaintiff's counsel and answered:

Q. If those coupling parts were in good condition, could they possibly have come apart, in your opinion, in that accident?

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)"

Fifth. The said Circuit Court of Appeals erred in not sustaining the third assignment of error upon the record in said cause, said assignment of error being as follows:

"The learned trial judge erred in refusing to allow the following question to be put by plaintiff's counsel and answered, and to allow plaintiff's witnesses to go into the following line of testimony:

Q. Which are the stronger, the automatic couplings or the drawbar and pin?

(Objected to.)

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)"

Sixth. The said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendant in error for costs of suit in said circuit court of appeals.

Seventh. The said Circuit Court of Appeals erred in holding that the Acts of Congress approved March 2, 1893, amended April 1, 1896, approved March 2, 1903, and approved April 14, 1910, being known as the Safety Appliance Act, did not require the placing of an automatic coupling between the locomotive and the tender of a train engaged in Inter-State commerce.

Wherefore, the said Mary Genevieve Pennell, Administratrix of the Estate of Jay Allen Pennell, Deceased, plaintiff in error prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States District Court for the Eastern District of Pennsylvania for such further proceedings in said cause as may be determined upon by this Honorable Court to the end that justice may be done in the premises.

GEORGE DEMMING,
CHARLES H. BURR,
Attorneys for Plaintiff in Error.

Endorsed: No. 1646. Assignment of errors. Received and Filed, February 13, 1913. Saunders Lewis, Jr., Clerk.

In the Supreme Court of the United States.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased, Plaintiff in Error and Plaintiff Below,

—

PHILADELPHIA AND READING RAILWAY COMPANY, Defendant in Error and Defendant Below.

Petition for Writ of Error.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Mary Genevieve Pennell, Administratrix of the Estate of Jay Allen Pennell, Deceased, the above plaintiff in error, feeling herself aggrieved by the final judgment entered against her in the above entitled case on the 27th day of January, 1913, by the Circuit Court of Appeals for the Third Circuit, which judgment affirmed a judgment of the District Court of the United States for the Eastern District of Pennsylvania, also entered against her in the same case on May 20th, 1912, and directed judgment to be entered in favor of the Philadelphia & Reading Railway Company, defendant in error, comes now by her attorney, George Demming, Esq., and shows that the above action was begun in the District Court of the United States for the Eastern District of Pennsylvania; that the jurisdiction of such District Court was not entirely dependent upon the opposite parties to the suit being citizens of different states, but that the suit arose under laws of the United States; and that petitioner is therefore entitled to a writ of error out of the Supreme Court of the United States in accordance with Section 241 of the Judicial Code. Petitioner, therefore, prays that a writ of error may be allowed to the Supreme Court of the United States, and also that an order be made fixing the amount of security for costs which the plaintiff in error shall give and furnish upon said writ of error, and that, upon giving said security, all further proceedings in this Court be suspended and stayed until the final determination of said writ of error by the Supreme Court of the United States.

And your Petitioner will ever pray, etc.

MARY GEN-*EI*VE PENNELL,
Administratrix of the Estate of
Jay Allen Pennell, Deceased.

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

Mary Genevieve Pennell, being duly sworn according to law, deposes and says that she is the plaintiff in error in the foregoing case and petition, that the statements contained in the petition are true, and that the writ of error therein prayed for is not taken out for the purpose of delay, but because she feels that an injustice has been done by reason of said judgment.

MARY GEN-IEVE PENNELL.

Sworn and subscribed to before me, this, the 5th day of February, 1913.

[SEAL.] WILLIAM L. WINDSOR, JR., *Alderman.*

My com. expires 1st Mon. in May, 1913.

Endorsed: No. 1646. Petition for writ of error. Received and Filed Feb. 13, 1913. Saunders Lewis, Jr., Clerk.

And now, this, the 12th day of February, 1913, upon consideration of the foregoing petition and affidavit, and upon motion of George Demming, Esq., Attorney for the Plaintiff in Error, and upon filing this petition for a writ of error and assignments of error, it is ordered that writ of error be, and it hereby is, allowed, to have review in the Supreme Court of the United States of the judgment entered herein and all the record, proceedings, etc., of the case and in any wise thereto pertaining, and that a citation be issued addressed as prayed for, returnable within thirty days hereafter, upon the entry of security in the sum of two hundred and fifty Dollars, that a supersedeas be granted and proceedings stayed upon this writ of error.

By the Court:

GEO. GRAY,
Circuit Judge.

Endorsed: No. 1646. Order granting writ of error. Received and Filed Feb. 13, 1913. Saunders Lewis, Jr., Clerk.

In the Circuit Court of Appeals of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

Circuit Court of Appeals, October Session, 1912.

No. 1646.

MARY GENEVIEVE PENNELL, Administratrix Est. of J. Allen Pennell,
vs.
PHILADELPHIA & READING R'W'Y CO.

Know all men by these presents, That Mary Genevieve Pennell, Administratrix of the Estate of J. Allen Pennell, is held and firmly bound unto Philadelphia and Reading Railway Co. their executors, administrators, or assigns, in the sum of Two hundred and 50/100 dollars, lawful money of the United States of America, to be paid unto the said Philadelphia and Reading Railway Co. their executors, administrators, or assigns, to which payment well and truly to be made I do bind and oblige my heirs, executors, and administrators, joint and severally by these presents.

Sealed with my hand and dated this 17th day of February, A. D., 1912,

Whereas, the above named Mary Genevieve Pennell heretofore citizen of the State of —— commenced an action in the Circui Court of Appeals of the United States, in and for the Eastern Dis trict of Pennsylvania, in the Third Circuit, against the said Phila delphia and Reading Railway Co.

Now therefore the condition of this obligation is such that if th above named Mary Genevieve Pennell in the said action shall pay on demand, all costs that may be adjudged, or awarded agains Philadelphia and Reading Railway Company, as aforesaid in action; then this obligation shall be void, otherwise the same shal be and remain in full force and virtue.

Signature of Principal Waived by Surety.

FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
HERMAN HOOPES,
Resident Vice-President.

Attest:
[SEAL.] E. HILL,
Resident Assistant Secretary.

Sealed and delivered in the presence of—
—— ——.

Endorsed: No. 1646. Bond on Writ of Error for Supreme Court Received and Filed Feb. 18, 1913. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you, or some of you between Mary Genevieve Pennell, Administratrix of the Estate of Jay Allen Pennell, Deceased, Plaintiff in Error, and Philadelphia & Reading Railway Company, Defendant in Error, a manifest error hath happened, to the great damage of the said Mary Genevieve Pennell, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same within thirty days, in the said Supreme Court of the United States, at the City of Washington, District of Columbia, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done

therein to correct that error, what of right, and according to the laws and custome of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 18th day of February, in the year of our Lord one thousand nine hundred and thirteen.

SAUNDERS LEWIS, JR.,
Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed by the court.

GEO. GRAY, *Judge.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this court, in the case of Mary G. Pennell, Plaintiff in Error, and Philadelphia & Reading Railway Company, Defendant in Error, No. 164, October Term, 1912, on file and now remaining among the records of the said Court, in my office.

In testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this Nineteenth day of February in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the United States the one hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Philadelphia & Reading Railway Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the United States, wherein Mary Genevieve Pennell, Administratrix of the Estate of Jay Allen Pennell, Deceased, is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Judge of the Supreme Court of the United States, at Philadelphia, the 18th day of Feb-

ruary, in the year of our Lord one thousand nine hundred and thirteen.

GEO. GRAY, *Judge.*

I hereby accept service of the within citation, etc.

WM. CLARKE MASON,
Counsel for Philadelphia & Reading Railway Company, Defendant.

Feb'ry 19, 1913.

Endorsed on cover: File No. 23,561. U. S. Circuit Court Appeals, 3d Circuit. Term No. 986. Mary Genevieve Pennell, administratrix of the estate of Jay Allen Pennell, deceased, plaintiff in error, vs. Philadelphia & Reading Railway Company. Filed February 24th, 1913. File No. 23,561.

IN THE

Supreme Court of the United States.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Ivy Allen Pennell, Deceased,
Plaintiff in Error and Plaintiff Below,

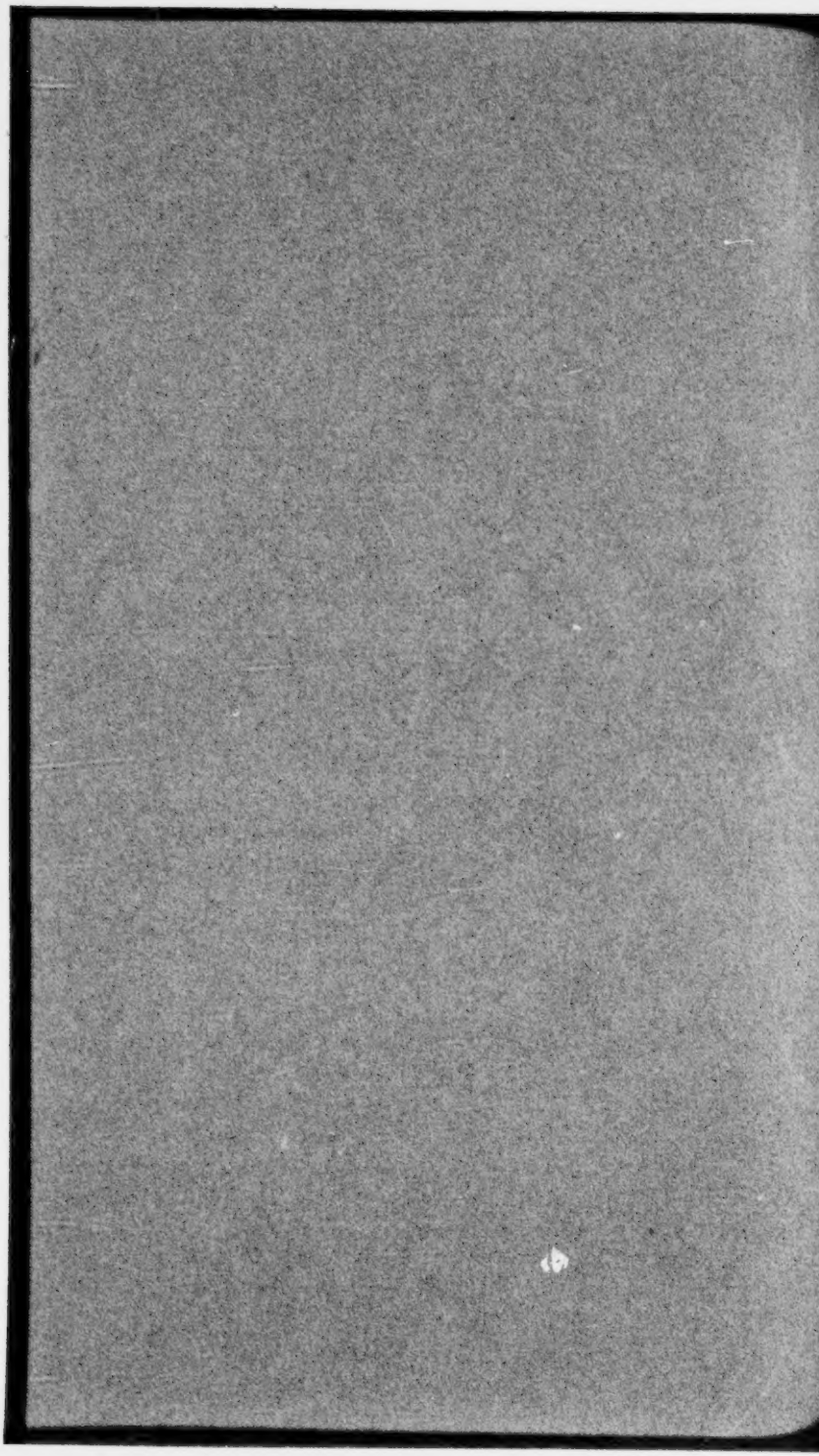
vs.

PHILADELPHIA AND READING RAILWAY COMPANY,
a Corporation of the State of Pennsylvania,
Defendant in Error and Defendant Below.

MOTION AND PETITION TO ADVANCE.

GEORGE DEMMING,
CHARLES H. BURR,
Attorneys for Plaintiff in Error.

International, 391 Chestnut St.



IN THE

Supreme Court of the United States,

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased, *Plaintiff-in-error and Plaintiff below,* *versus* PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania, *Defendant-in-Error and Defendant below.*	Oct. Term, 1912. No. 986.

And now, to wit, this third day of March, 1913, comes Mary G. Pennell, as administratrix of the estate of Jay Allen Pennell, deceased, by her attorneys, George Demming and Charles H. Burr, and moves this court to advance to such early date as may be convenient to said court for argument on writ of error to the United States Circuit Court of Appeals for the Third Circuit, in the case of Mary G. Pennell, administratrix, etc., vs. Philadelphia and Reading Railway Company, in which the said Mary G. Pennell, adminis-

tratrix, is plaintiff-in-error, and the Philadelphia and Reading Railway Company is defendant-in-error, and the said Mary G. Pennell, administratrix, herewith files her petition to this Honorable Court praying that argument upon the aforesaid writ of error may be advanced.

GEORGE DEMMING,
CHARLES H. BURR,
Attorneys for Plaintiff.

I hereby accept service of the petition herein.

WM. CLARK MASON,
Attorney for Defendant.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased, *Plaintiff-in-error and Plaintiff below,* *versus* PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania, *Defendant-in-error and Defendant below.*	Oct. Term, 1912. No. 986.

To the Honorable the Judges of the Supreme Court of the United States:

The petition of Mary G. Pennell, as administratrix of the estate of Jay Allen Pennell, respectfully shows:

1. That on or about the second day of March, 1912, your petitioner began a suit at law against the Philadelphia and Reading Railway Company under the Railroad Employers' Liability Acts of Congress of 1908 and 1910, to recover the sum of Fifty Thousand Dollars ($50,000) for the death of plaintiff's intestate. The negligence alleged, *inter alia*, was the failure of the defendant to comply with the Safety Appliance Acts, and particularly the provisions of said Acts requiring the locomotives or cars used in trains engaged in interstate commerce to be equipped with automatic couplers.

2. That at the trial of the said cause, it was shown that while a freight train was traveling from Harrisburg, Pennsylvania, to Hagerstown, Maryland, engaged in interstate commerce, the coupling between

the locomotive and the tender broke and gave way; that plaintiff's intestate, the fireman on the locomotive, working in his proper position over this coupling, fell through the gap occasioned by the parting of the coupling and was almost instantly killed. *There were forty-four cars attached to the locomotive to which automatic couplings were attached, and every one of these automatic couplings held. Between the locomotive and the tender there was no automatic coupling, but an old fashioned draw bar and pin coupling. This alone broke.*

3. That no evidence was offered on the part of the Railroad Company, and the trial judge directed the jury to find a verdict for the defendant.

4. That in refusing a motion for a new trial the learned trial judge expressed his reasons for refusing to allow the plaintiff to recover in the following words:

> "That a locomotive engine—that is, the whole "engine—is a 'car,' was decided in Johnson vs. "Railroad Co., 196 U. S. 1; and it was accordingly "held, that the rear end of the tender, where the "train is attached, must be equipped with an auto- "matic coupler. But no decision has been cited "that requires an automatic coupler between the "engine proper and its tender, and there seems "to be no reason for requiring it at that point."

5. That the learned Court of Appeals for the Third Circuit affirmed the judgment of the court below, concluding with these words:

> "Agreeing, as we do, with the conclusions "reached by the court below, that 'no decision has "'been cited that requires an automatic coupler "'between the engine proper and the tender, and "'that there seems to be no reason for requiring "'it at that point' the judgment is affirmed."

6. That your petitioner is advised by counsel learned in the law, and therefore avers, that the learned trial judge and the learned Court of Appeals for the Third Circuit erred in so construing the decision in Johnson vs. Railroad Company, and that the decision in Johnson vs. Railroad Company is emphatically to the effect that locomotives as such were within the provisions of the Safety Appliance Act of 1893. Further, that any and all doubt upon the subject is removed by the amendatory Act, approved March 2, 1903, in which the provisions of the aforesaid Act are expressly declared "to apply to all trains, *locomotives*, "*tenders*, cars and similar vehicles, used on any rail-"road engaged in interstate commerce."

Your petitioner submits that the interpretation made by the trial court and the Circuit Court of Appeals would operate to make meaningless the use of the word "locomotives" if said Act be construed to have no application to the attachment of automatic couplers between locomotives and tenders.

7. Your petitioner further shows that the railroads of this country have neglected and refused generally to place automatic couplers between the locomotives and the tenders of trains engaged in interstate commerce, and that under the protection and authority of the decision of the Court of Appeals for the Third Circuit in the case at bar such a condition will continue for a space of several years until this case be reached in its ordinary course upon the docket, unless this Honorable Court will, in view of the general interest to the community, and in view of the imperiling of the lives and limbs of the employes of the various railroad companies, advance this case for argument to the end that the railroad companies of the United States may as soon as possible, and not at the expiration of some

years, be forced to comply with the provisions of the Safety Appliance Acts of Congress.

8. Your petitioner would further respectfully suggest that the succinctness of the issue involved might render this case one suitable to be heard on the summary docket.

And your petitioner will ever pray, etc.,

MARY G. PENNELL,
As Administratrix, etc.

By her attorneys,
GEORGE DEMMING,
CHARLES H. BURR.

No. [illegible]

[illegible]

SUPREME COURT OF THE UNITED STATES

[illegible]

Petitioner and Plaintiff in Error,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania,

Defendant in Error and Defendant Below.

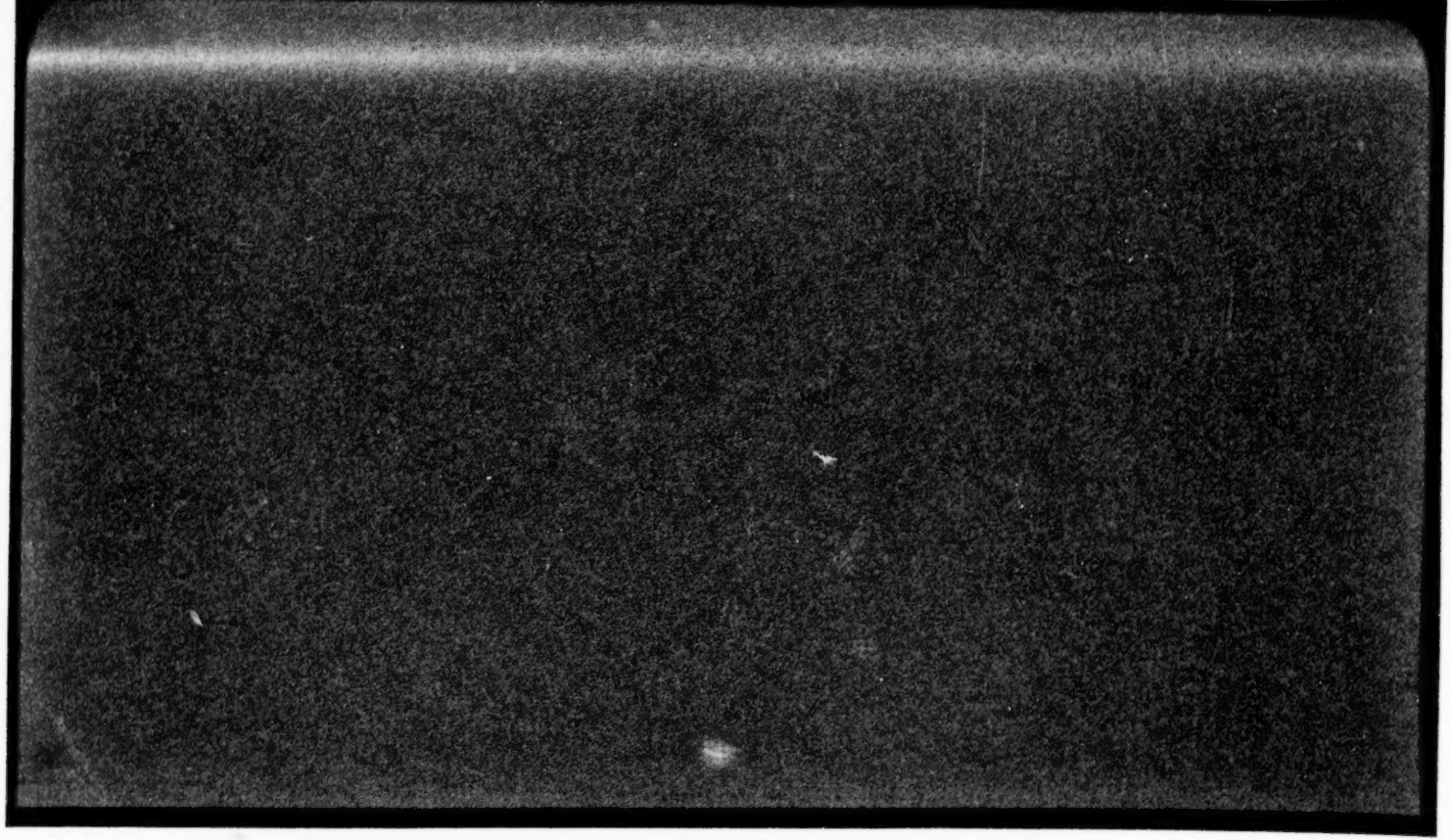
Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

MOTION AND PETITION TO ADVANCE.

GEORGE DESSING,

Attorney for Petitioner and Plaintiff in Error.

[illegible]



IN THE

Supreme Court of the United States.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased, *Plaintiff-in-error and Plaintiff below,* *vs.* PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania, *Defendant-in-error and Defendant below.*	Oct. Term, 1913. No. 469.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

And now, to wit, this thirteenth day of October, 1913, comes Mary G. Pennell, as administratrix of the estate of Jay Allen Pennell, deceased, by her attorney, George Demming, and moves this Court to advance for argument, to such early date as may be convenient to said Court, the case of Mary G. Pennell, administratrix, etc., vs. Philadelphia and Reading Railway Company, in which the said Mary G. Pennell, administratrix, is plaintiff-in-error, and the Philadelphia and

Reading Railway Company is defendant-in-error, and the said Mary G. Pennell, administratrix, herewith files her petition to this Honorable Court praying that argument upon the aforesaid writ of error may be advanced.

GEORGE DEMMING,
Attorney for Plaintiff-in-Error.

I hereby accept service of the within motion and petition.

Attorney for Defendant.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased, *Plaintiff-in-error and Plaintiff below,* *vs.* PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania, *Defendant-in-error and Defendant below.*	Oct. Term, 1913. No. 469.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Mary G. Pennell, administratrix of the estate of Jay Allen Pennell, deceased, respectfully shows:

1. That on or about the second day of March, 1912, your petitioner began a suit at law against the Philadelphia and Reading Railway Company under the Railroad Employers' Liability Acts of Congress of 1908 and 1910, to recover the sum of Fifty Thousand Dollars ($50,000) for the death of plaintiff's intestate. The negligence alleged, *inter alia*, was the failure of the defendant to comply with the Safety Appliance Acts, and particularly the provisions of said Acts requiring the locomotives or cars used in trains engaged in interstate commerce to be equipped with automatic couplers.

2. That at the trial of the said cause, it was shown that on December 31st, 1911, while a freight train was traveling from Harrisburg, Pennsylvania to Hagerstown, Maryland, engaged in interstate commerce, because of the sudden stopping of the train occasioned by a bursting air hose at the rear of the train, the coupling between the locomotive and the tender broke and gave way; that plaintiff's intestate, the fireman on the locomotive, working in his proper position over this coupling, and without any negligence whatsoever on his part, fell through the gap occasioned by the parting of the coupling and was almost instantly killed. *There were forty-four cars attached to the tender to all of which automatic couplings were connected, and every one of these automatic couplings held. Between the locomotive and the tender there was no automatic coupling, but an old fashioned draw bar and pin coupling. This alone broke.*

3. That no evidence whatever was offered on the part of the Railroad Company, and the trial judge directed the jury to find a verdict for the defendant.

4. That in refusing a motion for a new trial the learned trial judge expressed his reasons for refusing to allow the plaintiff to recover in the following words:

> "That a locomotive engine—that is, the whole "engine—is a 'car,' was decided in Johnson vs "Railroad Co., 196 U. S. 1; and it was accordingly "held, that the rear end of the tender, where the "train is attached, must be equipped with an auto- "matic coupler. But no decision has been cited "that requires an automatic coupler between the "engine proper and its tender, and there seems "to be no reason for requiring it at that point."

5. That the learned Court of Appeals for the Third Circuit affirmed the judgment of the court below, concluding with these words:

"Agreeing, as we do, with the conclusions "reached by the court below, that 'no decision has "'been cited that requires an automatic coupler "'between the engine proper and the tender, and "'that there seems to be no reason for requiring "'it at that point' the judgment is affirmed."

6. That your petitioner is advised by counsel learned in the law, and therefore avers, that the learned trial judge and the learned Court of Appeals for the Third Circuit erred in so construing the decision in Johnson vs. Railroad Company, and that the decision in Johnson vs. Railroad Company is emphatically to the effect that locomotives as such are within the provisions of the Safety Appliance Act of 1893. Further, that any and all doubt upon the subject is removed by the amendatory Act, approved March 2, 1903, in which the provisions of the aforesaid Act are expressly declared "to apply to all trains, *locomotives*, "*tenders*, cars and similar vehicles, used on any rail-"road engaged in interstate commerce."

Your petitioner submits that the interpretation made by the trial court and the Circuit Court of Appeals would operate to make meaningless the use of the words "locomotives" and "tenders" if said Act be construed to have no application to the attachment of automatic couplers between locomotives and tenders.

7. Your petitioner is informed and believes that several other accidents of an exactly similar nature have occurred on railroads in various sections of the country, and where the same defense and reply to demands for indemnification by injured parties have been made as in her case. The speedy decision of her case by the highest court of the land is, therefore, a matter of public import.

8. However this may be, and aside from the general importance of the determination of this matter,

your petitioner strongly feels that there must surely be some legal redress for her for the loss of her deceased husband under the circumstances as narrated above, where he was properly and fully discharging his duty, entirely without any carelessness on his part, and where there is at least a serious question and doubt whether the statutory duties of his employer were fulfilled.

9. Your petitioner was made a widow by reason of this accident, with one small child, a girl, to support, and was left destitute and entirely dependent upon her own efforts for such support of herself and her child. For nearly two years now she has struggled to do this and carry on this unsuccessful litigation in an effort to secure what she believes to be her rights.

If, in the wisdom of this Court, it is consistent with the other prior and probably more important business before it, and not trespassing and engrossing too much upon the rights and time of other litigants, she prays this Court to fix an early time for the argument and disposal of her writ of error. As she is advised by her counsel that the hearing of her case would consume but a comparatively brief space of time, she suggests to the Court, if necessary, that her case may be placed on the summary docket.

For all of which relief your petitioner respectfully prays.

MARY G. PENNELL,
Administratrix of the Estate of Jay Allen Pennell, Deceased.

By her attorney,

GEORGE DEMMING.

FILED
NOV 15 1913
JAMES D. MAHER
CLERK

No. 469.

October Term, 1913.

IN THE

Supreme Court of the United States.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased,

Plaintiff in Error and Plaintiff Below,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania,

Defendant in Error and Defendant Below.

Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE DEMMING,
Attorney for Plaintiff in Error.

International, 236 Chestnut St.

INDEX.

	Page
Names of the Parties	1
Nature of the Proceedings	1
Statement of the Question involved	2
Statement of the Case (Presenting succinctly the question involved and the manner in which it was raised)	3
Specification of the Errors relied upon	5
Argument	7

ALPHABETICAL LIST OF ALL CASES REFERRED TO, TOGETHER WITH REFERENCES TO PAGES WHERE CITED.

	Page
Benson vs. Railway Co., 75 Minn. 163	12
Chicago, Burlington & Quincy Rwy. Co. vs. U. S., 220 U. S. 559	10
Delk vs. St. Louis and San Francisco R. R. Co., 220 U. S. 580	10
East St. Louis Connecting Rwy. Co. vs. O'Hara, 150 Ill. 580	12
Fleming vs. Southern Railway Co., 131 N. C. 476	12
Johnson vs. Southern Pacific Co., 196 U. S. 1	10
Kansas City, etc., Railroad Co. vs. Crocker, 95 Ala. 412	12
Mayor, etc. vs. Third Ave. R. R. Co., 117 N. Y., 404 and 646	12
Phila. & Reading Rwy. Co. vs. Winkler, 4 Pennewell's Del. Reports, 387	12
Safety Appliance Acts of Congress of 1893, 1903 and 1910	9
St. Louis and Mountain, etc., Rwy. Co. vs. Taylor, 210 U. S. 281	10
Thomas vs. Georgia R. R. and Banking Co., 38 Ga. 222	12
United States vs. Lacher, 134 U. S. 624	10

IN THE

Supreme Court of the United States.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased, *Plaintiff-in-error and Plaintiff below,* vs. PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania, *Defendant-in-error and Defendant below.*	Oct. Term, 1913. No. 469.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

AN ACTION IN TRESPASS UNDER THE RAILROAD EMPLOYERS' LIABILITY ACTS OF CONGRESS OF 1908 AND 1910, BY THE WIDOW, APPOINTED ADMINISTRATRIX, ON BEHALF OF HERSELF AND HER INFANT DAUGHTER FOR THE ALLEGED WRONGFUL KILLING OF HER HUSBAND WHILE EMPLOYED BY THE DEFENDANT AND DUE TO ITS ALLEGED NEGLIGENCE IN NOT PROVIDING PROPER AND NECESSARY APPLIANCES AS REQUIRED BY THE SAFETY APPLIANCE ACTS OF CONGRESS OF 1893, 1896, 1903 AND 1910.

STATEMENT OF THE QUESTION INVOLVED.

The question involved in the present writ of error is whether, under the facts of this case, the defendant railroad company was guilty of negligence and guilty also of a violation of the Safety Appliance Acts of Congress, and whether the case should have been submitted to a jury to determine the amount of damages to be awarded the plaintiff suing as administratrix.

STATEMENT OF THE CASE.

This suit was brought by Mary G. Pennell, administratrix of the estate of Jay Allen Pennell, deceased, on behalf of herself as the widow of said Jay Allen Pennell, and his minor daughter. The suit was brought under the Railroad Employers' Liability Acts of Congress of April 22, 1908, and April 5, 1910, against the Philadelphia and Reading Railway Company, a common carrier corporation incorporated under the laws of the state of Pennsylvania, by whom the late Pennell was employed in the capacity of a fireman on one of its freight locomotives. The accident happened on December 31, 1911. At the time of the accident Pennell was firing on a locomotive pulling a freight train from Harrisburg, Pennsylvania, to Hagerstown, Maryland, so there is no question as to the train being engaged in interstate commerce and the application therefore of the Acts under which suit was brought.

About five o'clock in the morning of the above date, and therefore dark, at a point near Moor's Mill, Cumberland County, Pennsylvania, as this freight train, composed of forty-four freight cars, engine, tender and caboose, was proceeding on its way, with every member of the crew at his proper position, going at a speed of about fifteen miles an hour, on a level track, with a slight curve, suddenly and without warning the air hose coupling between the last car and the one next to it gave way and the hose fell apart. This caused the air to be instantly put on the brakes of the whole train, tending to bring it to a sudden stop.

There was necessarily considerable strain upon the coupling apparatus of all the cars. *Every car on the train was coupled to its adjoining car by an automatic coupling device, except the tender to the engine.*

Every coupling on the train stood the strain and remained intact, properly performing its function, except the coupling between the tender and engine.

The engine was what the engineer described as an I-8 class engine, with the engineer's cab half-way up the boiler, on the side, and the fireman working at the end of the boiler and engine, about and over the space where the tender and engine are coupled together. The coupling between the tender and engine, and the only coupling of its kind in the entire train, was the old-fashioned draw-bar and pins. The pin at the tender end of the coupling broke, allowing the engine to pull away from the rest of the train before the engineer knew of the existence of any trouble in time for him to stop the engine and train. The fireman, Pennell, working industriously in his proper position, fell through the gap suddenly opening at his feet to the track beneath, and before the train came to a complete standstill was run over by five cars and almost instantly killed.

From the evidence, apparently the railroad crew either did not look at the couplings on the air hose which broke in the first instance, or, if they did, could not recall what condition they were in. The foreman of the wreck crew, sent for after the accident, testified that the air coupling "was somewhat worn" (page 57), and plaintiff in error at the trial produced two experts who testified positively that the coupling on the air hose could not possibly come apart as it did unless there was a defect in it of some sort.

The trial judge refused to let the case go to the jury, and gave binding instruction for the defendant in error, the railroad company.

The Circuit Court of Appeals affirmed this judgment.

ASSIGNMENTS OF ERROR.

First.—The Circuit Court of Appeals for the First Circuit erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania on the verdict entered on the twentieth day of May, 1912, in favor of said defendant in error and against said plaintiff in error.

Second.—The said Circuit Court of Appeals erred in not reversing the said judgment of the said District Court, and in not remanding said cause to said District Court for a new trial.

Third.—The said Circuit Court of Appeals erred in not sustainng the first assignment of error upon the record in said cause, said assignment of error being as follows:

> "The learned trial judge erred in directing the jury to find a verdict for the defendant."

Fourth.—The said Circuit Court of Appeals erred in not sustaining the second assignment of error upon the record in said cause, said assignment of error being as follows:

> "The learned trial judge erred in refusing to allow the following question to be put by plaintiff's counsel and answered:
>
> Q. If those coupling parts were in good condition, could they possibly have come apart, in your opinion, in that accident?
>
> (Objected to.)
>
> (Objection sustained.)
>
> (Exception noted for plaintiff by direction of the Court.)"

Fifth.—The said Circuit Court of Appeals erred in not sustaining the third assignment of error upon the record in said cause, said assignment of error being as follows:

> "The learned trial judge erred in refusing to allow the following question to be put by plaintiff's counsel and answered, and to allow plaintiff's witnesses to go into the following line of testimony:
>
> Q. Which are the stronger, the automatic couplings or the drawbar and pin?
>
> (Objected to.)
>
> (Objection sustained.)
>
> (Exception noted for plaintiff by direction of the Court.)"

Sixth.—The said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendant in error for costs of suit in said Circuit Court of Appeals.

Seventh.—The said Circuit Court of Appeals erred in holding that the Acts of Congress approved March 2, 1893, amended April 1, 1896, approved March 2, 1903, and approved April 14, 1910, being known as the Safety Appliance Acts, did not require the placing of an automatic coupling between the locomotive and the tender of a train engaged in interstate commerce.

ARGUMENT.

At the trial of this case in the court below and in the argument before the Circuit Court of Appeals, counsel for plaintiff in error contended that there was sufficient evidence as to the defective condition of the air hose couplings to take the case to the jury on that point alone. Counsel for plaintiff in error still believes that this is so and contends that the trial judge erred in not holding that the evidence upon this part of the case, meagre though it necessarily was, was yet sufficient to carry the entire case to the jury. While it is true that the doctrine of *res ipsa loquitur* does not apply as between master and servant, still there was *some* affirmative proof of a defective air hose coupling, which parted, and this proof, uncontradicted as it was, should have been passed upon by the jury.

Nevertheless, so far as the main principle of this appeal is concerned, this is a minor matter and this argument will not dwell upon it further, but will address itself particularly to the other and more important subject in the case, viz.: the fact that there was, at the time of the happening of the accident, an old-fashioned draw bar and pin coupling between the engine and tender, and that this broke, causing thereby the death of the fireman.

In the very beginning certain important points may be taken as conceded, thereby greatly simplifying the case:

In the first place, since the dead man was employed as fireman on a locomotive drawing a train of through cars from a point in one state to a point in another state (pages 23 and 37) there can be no question but that he was employed in interstate commerce and that

the Railroad Employers' Liability Acts of Congress apply to the case, under which Acts the suit was brought.

In the next place, since at the time of the accident, the dead man was working at his proper and required duties and at his appointed and designated station (page 25), there can be no question raised that his negligence in any way entered into the accident, and the element of contributory negligence therefore drops out of the case.

In the third place, the evidence is undisputed, that the coupling apparatus between this particular locomotive and tender was the old kind, consisting of a draw bar and two pins, that this was the only coupling of its kind in the whole train, and that every other car in the train was coupled to its adjoining car with the comparatively newer and demanded automatic coupling device (pages 32 and 38).

In the next place, there is no dispute whatever over the fact that every coupling in the train successfully withstood the strain and held firmly and intact, except the draw bar and pin coupling between the locomotive and tender which yielded and broke (page 40).

And, finally, the evidence in the case is clear and without any contradiction that the tender, which was coupled on to the locomotive with the draw bar and pins, was an entirely separate and distinct car and entity in itself (pages 24 and 32).

The question then is, was the employment by the defendant railroad company of this draw bar and pins coupling between the locomotive and tender a violation of the Federal law and one which would make it respond in damages for the death of this employee?

Plaintiff in error contends that it was.

What is the proper construction of the language of the Safety Appliance Acts of 1893, 1903 and 1910?

The Act of Congress of March 2, 1893, provides:

> "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

In construing and applying the requirements of this Act as expressed in the above language to the facts of the present case, plaintiff in error contends that the courts must apply and construe these provisions with regard to the primary object of the Act, which is "to promote the safety of employees and travelers upon railroads," as set forth in the title of the Statute. Although one purpose, and possibly the chief purpose, in employing this language in this Act is to protect and save brakemen who have to go in between cars to couple and uncouple them; yet the general purpose of the Act is to obtain and bring about the safety of all railroad employees of whatever class, and the requirement of the Act passed, as the expression of this purpose, is universal and most forcible and sweeping in its language, and should be so applied and construed in all matters relating to the protection of railroad workmen and to specific railroad accidents.

For all the more reason should the trial judge in this case have both literally and liberally construed this Statute, when plaintiff in error offered, as she here did, to prove that the automatic coupling device is stronger and much safer than the old draw bar and pin, by reason of the diffusion of the stress and strain of automatic coupling devices, by their construction, through many parts, as compared with the old draw bar and pin coupling.

The facts of the accident themselves prove this, because the evidence shows, as previously stated, that every automatic coupling device in the whole train held firmly and securely, and the one and only draw bar and pin coupling device in the train was the one coupling that gave way and broke. The conclusion is, therefore, logical and irresistible that, had there been the modern type of automatic coupling between the engine and tender instead of the old and obsolete one of the draw bar and pins, this accident, in all probability, would never have happened and this man's life would have been saved.

In construing these so-called "Safety Appliance Acts," this Court has frequently held that these Acts are mandatory, and that the duty to have an automatic coupling is an absolute duty and can be evaded in no way, shape or form.

St. Louis and Mountain, etc., Railway Co. vs. Taylor, 210 U. S. 281;
Chicago, Burlington & Quincy Railway Co. vs. U. S., 220 U. S. 559.
Delk vs. St. Louis and San Francisco R. R. Co., 220 U. S. 580;

To have held the defendant railroad company guilty of negligence upon the evidence in this case would have been the reasonable construction of the Statute and one in line with the object aimed at by Congress.

United States vs. Lacher, 134 U. S. 624.

Likewise would it appear, that, in construing these Federal Statutes, the Supreme Court of the United States has held that the engine is a car and that the tender is a car, each separate and apart from the other.

Johnson vs. Southern Pacific Co., 196 U. S. 1.

The learned trial judge below, in giving his opinion refusing a new trial, and the Circuit Court of Appeals in upholding that opinion, state that the decision in the foregoing case does not hold that a tender should have an automatic coupling at the end where it is coupled to the engine, but merely decides that it should have one at the opposite end from the engine.

It is difficult to see how or why one should attempt to differentiate between the two ends of the tender with reference to the construction and application of these Statutes of Congress.

The only possible reason or plausible excuse for so doing would be because in the Safety Appliance Act of 1893, the paragraph above quoted and referring to automatic couplers ends with the words "which can be uncoupled without the necessity of men going between the ends of the cars." The likely inference from this language, it might be maintained, is that the protection of the Act is only intended to apply to railroad brakemen or switchmen, engaged in coupling and uncoupling cars.

But is not such a narrow and close construction bound to broaden to the more liberal one here contended for in the light of the undoubted intent of these Statutes to generally and freely protect the lives and limbs of railroad employees while engaged in their hazardous occupation? And more especially, is this latter construction too comprehensive, when one considers all the undisputed facts of the present case,—the lack of contributory negligence, the holding intact of all the automatic couplings, the presence of but one bar and pin coupling which broke, etc.?

The whole question seems to be, therefore: Is a tender a car within the meaning of these Statutes?

If it is a car at one end, it certainly must be a car at the other end, or where and under what rule is one

going to draw the line of division and say, here it ceases to be a car and the Statute does not apply?

The tender runs on a set of wheels of its own, it is entirely separate and distinct from the engine, (page 32) and is only connected to the engine by a coupling device, the same as any other car is connected to the adjoining one. Therefore, why attempt to make a distinction, especially when the desire for this distinction is actuated only to justify the use of an inferior, unsafe, weak and antiquated coupling apparatus as proved in this particular accident?

In the decision of Johnson vs. Southern Pacific Co., supra, which the lower court held merely decides that a tender requires an automatic coupling device on the further end from the engine, the whole argument of the appellant in that case, and the briefs filed, seem to be to the effect that a tender is a car, distinct in itself, the same as any other car in a train.

A number of cases, from the various state courts, are cited to support this contention, as follows:

Philadelphia and Reading Railway Co. vs. Winkler, 4 Pennewill's Del. Reports, 387;

Fleming vs. Southern Railway Co., 131 North Carolina, 476;

East St. Louis Connecting Railway Co. vs. O'Hara, 150 Ill. 580;

Kansas City, etc., Railroad Co. vs. Crocker, 95 Ala. 412;

Thomas vs. Georgia R. R. and Banking Co., 38 Georgia, 222;

Mayor, etc., vs. Third Ave. R. R. Co., 117 N. Y. 404 and 646;

Benson vs. Railway Co., 75 Minn. 163.

All these decisions are to the effect that a tender to a locomotive, and anything else, entirely supported by and running on its own system of wheels, is a car.

There is no perplexity as to the definition of the word *car* used in the Safety Appliance Statutes, and it has but one signification.

Says the Standard Dictionary:

> Car: A vehicle for use on a railroad, usually mounted on trucks, and often provided with mechanism for coupling, so as to form part of a train.

Says Chamber's 20th Century:

> Car: A vehicle moved on wheels, applied to very various forms. In America, applied to all vehicles for railway traveling.

Likewise, the Century Dictionary:

> Car: A wheeled vehicle or conveyance. A vehicle running upon rails.

Says Murray's New English Dictionary:

> Car: A wheeled vehicle or conveyance. In the United States the term has become restricted almost entirely to vehicles designed for traveling on railways.

Again, says Webster's New International Dictionary:

> Car: A vehicle moved on wheels. A vehicle adapted to the rails of a railroad.

All the other authorities are to the same purpose.

It is respectfully submitted that the evidence plainly shows that the engine is a car and the tender is a car, each separate from the other; that the language of the Safety Appliance Acts of Congress is clear and unmistakable as to the requirement of an automatic coupling device between each car; that, in the present case, where a sudden and heavy strain was put upon this train, every automatic coupling device holding intact and only the pin breaking in the old-fashioned draw bar and pin coupling between locomotive and tender, the court below should have construed and applied these Statutes and have declared, in accordance with their precise language, that as a matter of law, the defendant railroad company was guilty of negligence in using this coupling, and have directed the jury to find a verdict for the plaintiff, it being impossible for the plaintiff's deceased to have in any way contributed to the accident, or to have been guilty of any negligence whatever, or have assumed any risk.

GEORGE DEMMING,
Counsel for Plaintiff in Error.

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No. 469.

October Term, 1913.

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IN THE

Supreme Court of the United States

MARY GENEVIEVE PENNELL
Administratrix of the Estate of Jay Allen Pennell, Deceased
Plaintiff in Error and Plaintiff below

vs.

PHILADELPHIA & READING RAILWAY COMPANY
a Corporation of the State of Pennsylvania
Defendant in Error and Defendant below

Writ of Error to the United States Circuit Court of Appeals for the Third Circuit

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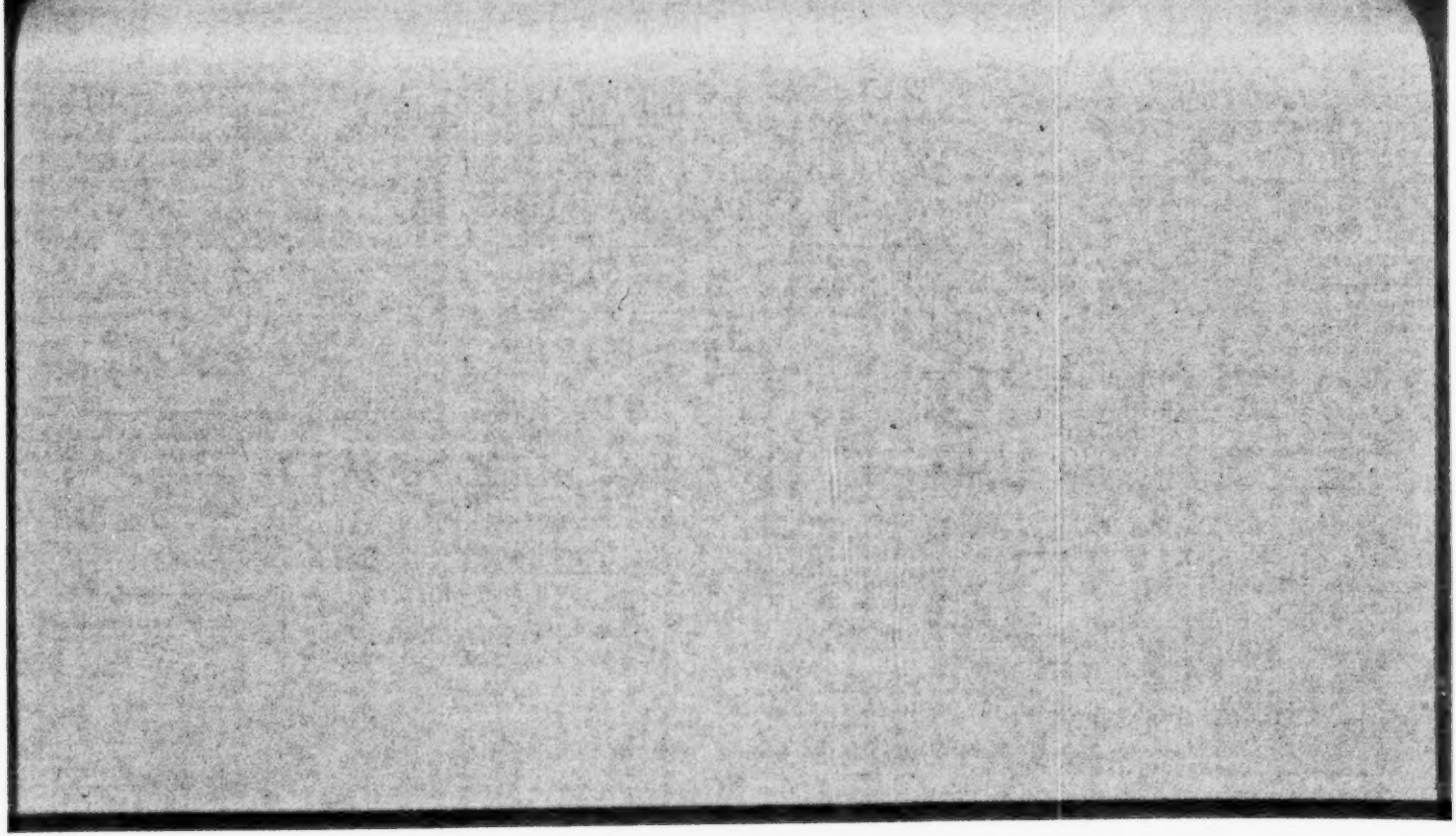
BRIEF FOR DEFENDANT IN ERROR

WM. CLARKE MASON
CHARLES HEEBNER
Counsel for Defendant in Error.



IN THE

Supreme Court of the United States

October Term, 1913. No. 469.

Mary Genevieve Pennell, Administratrix of the Estate of Jay Allen Pennell, Deceased, Plaintiff in Error and Plaintiff Below,

vs.

Philadelphia and Reading Railway Company, a corporation of the State of Pennsylvania, Defendant in Error and Defendant Below.

BRIEF FOR DEFENDANT IN ERROR.

ARGUMENT.

The charge of negligence is based upon the failure of the defendant to provide an automatic coupling between the tender and the engine. The evidence shows—and it was admitted by the defendant—that the coupling between the engine and tender was a bar and pin coupling, and not an automatic coupler, but the defendant contended at the trial, and the learned trial judge held that this fact was immaterial to the case at bar.

The evidence disclosed that while engaged in an interstate movement the train upon which the plaintiff's decedent was employed as a fireman was suddenly stopped while going at approximately fifteen miles an hour. The stopping of the train was caused by the air hose between the last car and the car next to it coming apart, thereby setting the brakes upon the whole train. The engine pulled away from the tender, breaking the coupling, and the fireman was thrown from the tank upon the track and killed.

The plaintiff in error filed seven assignments of error (pages 5-6, Appellant's book). Apparently the fourth and fifth assignments must have been abandoned, as no argument has been directed toward them, and the remaining assignments of error seem to be argued together.

The plaintiff in error contends that the failure to have an automatic coupling between the engine and tender was a violation of the Act of Congress of March 2, 1893, and the supplements thereto, and as that was negligence *per se*, the learned trial judge was in error in directing a verdict for the defendant.

Before this position can be maintained it must be proved, first, that the engine and tender are two cars in contemplation of the Act of Congress and, second, that the violation of the Act, if negligence, was the proximate cause of the accident.

The Act of Congress of March 2, 1893, Section 2 (27 U. S. Statutes at Large, 531, Chapter 196), provides:

> "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

In support of the contention that it was negligence on the part of the defendant to have a bar and pin coupling between the engine and tender, James E. Mellon was called by the plaintiff in error as an expert witness, and his testimony (pages 65, 66, 67, Transcript of Record) shows the character of questions asked to establish the evidence desired to prove this fact. They were as follows:

"Q. At the present time is or is it not proper practice to have simply the drawbar and coupling between the engine and tender?

"(Objected to.)

"THE COURT: You have not laid a proper foundation for any such question as that.

"By MR. DEMMING:

"Q. Is or is not the drawbar and the pin the only connection at the present time required between the locomotive and the tender?

"(Objected to.)

"(Objection sustained.)

"(Exception noted for plaintiff by direction of the Court.

"Q. Is or is it not proper to have as the only connection between the locomotive and the tender the drawbar and pin?

"(Objected to.)

"(Objection sustained.)

"Q. Are you familiar with the connections in use at the present time on railroads between locomotives and tenders?

"A. I am.

"Q. What are those connections?

"MR. MASON: Let us have his experience a little bit more definite.

"By MR. MASON:

"Q. What has been your experience in inspecting such connections?

"A. In designing of locomotives for twenty years; in inspection of locomotives at Baldwin's, Dunkirk, and Schenectady.

"Q. For what roads?

"A. For the Lackawanna Railroads.

"Q. No other railroad?

"A. No.

"Q. Then all you would testify to would be what was the custom on the Lackawanna Railroad?

"A. Well, as far as the application of different devices is concerned, I am familiar with what other roads use, through my studies and through an examination of locomotives being built for other roads in these different shops.

"MR. MASON: I am perfectly willing to have him answer that question, with that qualification.

"By MR. DEMMING:

"Q. You are thoroughly familiar with the methods adopted on all roads, are you not, in the East?

"A. Yes, sir.

"Q. Will you tell us what those methods are?

"A. In addition to the drawbar, they have on some roads, namely, the Pennsylvania, two additional or supplemental drawbars, what are called radial bars, one on each side of the main or central drawbar, separate, so as to accommodate the curving of the locomotive around curves. Those two bars are of smaller diameter than the pin and the main bar, and are arranged so that the two pins on the supplemental drawbars or radial bars are about half

of the area of the main pin. On other roads it is almost standard practice, instead of the radial or supplemental drawbars, to use chains, chains secured to the back heads or frame heads of the locomotive, and hooked in with hooks into the I-bolts through the sills of the tenders, one on each side of the center.

"Q. What is the purpose of those chains and radial bars?

"A. In case of the failure of the main drawbar that they will take up the shock and prevent the separation of the engine and tender.

"Q. In case of the failure of the main drawbar and pin?

"A. Yes, sir.

"Q. You are counting the pin connecting the drawbar as part of the main coupling apparatus?

"A. Yes, sir.

"Q. They should be sufficient to hold them together if main drawbar gives?

"A. That is correct.

"Q. You say they are called safety chains for that purpose, I suppose?

"A. Safety chains.

"Q. Which are the stronger, the automatic couplings or the drawbar and pin?

"(Objected to.)

"(Objection sustained.)

"(Exception noted for plaintiff by direction of the Court.)"

It appears from this testimony that the plaintiff's own expert shows that no railroad, to his knowledge, used an automatic coupler between the engine and tender. This witness merely testifies that in addition to the bar through which the pin is passed to hold the engine and tender together, there are supplemental smaller bars or chains used as additional security.

The record in this case fails to disclose whether or not there were either supplemental bars or chains connecting the engine and tender in question, in addition to the bar and pin which broke. If the absence of such supplemental bars or chains is to be the basis for the charge of negligence, the burden is upon the plaintiff to prove they were lacking. This burden has not been discharged.

In view of the testimony given by Mellon, concerning the usual and customary way to couple an engine with a tender, to have permitted him to answer the question (p. 67 of Record), contained in the fifth assignment of error, would have been to place upon the record the merest speculation and guess.

A similar question concerning such evidence and a charge of error against the learned trial judge

by reason of his failure to admit it, was disposed of in **Briggs vs. Railroad Co.**, 125 Fed. Rep., by the Circuit Court of Appeals, composed of Judges Sanborn, Vandeventer and Thayer. Thayer, C. J., there said:

> "There was no substantial evidence tending to show that the death of the plaintiff's husband was proximately caused or occasioned by the fact that the engine was not provided with a long pilot. It is most reasonable to believe that if the engine had been provided with a long pilot, and had run into a herd of 100 head of cattle asleep on the track, going a speed of 35 miles an hour, the result would have been a derailment and the overthrow of the engine. That such would have been the result if it had had a long pilot instead of a short one seems to us to be mere speculation; or, in other words, an inference resting upon no substantial basis of fact such as will serve to sustain a verdict.
>
> "Counsel for the plaintiff in error calls our attention to the fact that he asked one of the plaintiff's witnesses, namely, the engineer of the train, whether, if the engine in question had been equipped with a long pilot, such as was at first attached to it, it would have cleared the track of cattle standing up when struck; and he complains because the witness was not permitted to answer the question. We think, however, that if he had been permitted to answer,

> and he had replied in a manner favorable to the plaintiff, the answer would have been a mere guess or surmise on his part, rather than credible expert testimony on which the jury could have lawfully founded a verdict in favor of the plaintiff. Such testimony, in our opinion, would have been in the highest degree speculative and unreliable."

The fact that the defendant used a bar and pin coupling between the engine and tender, in conformity with the general custom of other railroads, cannot be charged against the defendant as negligence, unless such use is prohibited by statutory enactment.

It would seem, therefore, that the plaintiff in error can only charge the defendant with negligence, so far as the present record is concerned, by showing that the use of the bar and pin coupling was in violation of the Act of Congress of March 2, 1893, and from that fact argue that there was negligence *per se*.

The plaintiff supports her argument by the citation of certain authorities which it is contended hold that an engine and tender are two separate cars, and therefore are required by the Act to be connected by an automatic coupler.

In all of the cases cited by the plaintiff the negligence charged was the failure of the defendant to have an automatic coupler at the front of the engine or the rear of the tender when attempting to couple the locomotive and tender to another car. In all of these cases also the tender and engine are referred to as the locomotive and assumed to be one complete "car."

In **Johnson vs. Southern Pacific Railroad Co.**, 196 U. S., 1, cited by the plaintiff as authority for her interpretation of the Act, it is interesting to note that the brief of the Attorney-General, in referring to the "locomotive," refers, in fact, to the tender, and the testimony shows that the engine "backed up" and the tender was therefore that part of the car presented for the coupling.

It also appears to have been the opinion of the Supreme Court of the State of Michigan that a tender and engine are to be considered as one for the purposes of operation. In **Blanchard vs. Railroad Company**, 139 Michigan, 694, referring to the fact that a State statute providing for automatic couplings was to be applied to freight cars only, the Supreme Court uses language which is pertinent

here, where in citing a list of cars to which the statute could not apply it says: " It omits to name locomotives, tenders (*which are, in fact, a necessary part of locomotives*), passenger cars," etc.

It is respectfully submitted that there is, in addition to the fact that the engine and tender together have always been considered one car, a logical reason for so regarding them under the Act. The purpose of the Act was to render it unnecessary for employees to go between the cars to couple them. No such necessity exists in joining the engine and tender for the reason that the pin is dropped through the bar from the tank of the tender, where no dangerous position is assumed by the employee in so doing. The tender is an integral and necessary part of the engine, as the engine cannot be moved unless the coal carried by the tender is available for its fires. To hold that they are separate entities is an absurdity.

The description given by the witnesses shows that the coupling of the engine to the tender is made in a manner that is intended to be permanent in its nature for at least a given period of time, and is not of the character existing between cars which are coupled and uncoupled as the necessity for shifting

and changing their position may arise. One of the train crew describes the coupling as follows:

(P. 26 of Record):

"A. There practically is not any opening. The engine and tender are coupled about that close. (Indicating.)

"Q. About how close?

"A. About that close.

"Q. The engine and tender?

"A. Yes.

"Q. How many inches do you call that?

"A. About six of eight inches, as near as I can tell.

"Q. The platform and that sill of the tender came within about six inches of the sill of the locomotive. Is that what you mean?

"A. Yes, sir.

(Pp. 32-33 of Record):

"Q. The coupling between the engine and tender is in the nature of a permanent coupling, is it not?

"A. Yes, sir.

"Q. And attached to the engine is a draw-bar?

"A. Yes, sir.

"Q. And that fits into the yoke of the tender?

"A. Yes.

"Q. And the pin is dropped down to bind those two together?

"A. Yes."

In considering the application of the Act of 1893, therefore, to the case at bar, the purpose of the Act, as contained in Section 2, must be continually borne in mind. Automatic couplers are required by it so that cars can be coupled automatically and "can be uncoupled without the necessity of men going between the ends of the cars."

If the record of this case disclosed the fact that the plaintiff's decedent had been injured because he went between two cars not equipped with automatic couplings to couple or uncouple them, and was thereby injured, the Act would apply. The facts in this case, however, show that such was not the case.

The engine and tender separated at the point of the coupling between them, not because of the character of the coupling, but because the brakes upon forty-five cars following the locomotive were set by the separating of the air hose. The engine was still under power, and therefore as the engine was at the extreme end of the train from the point where the brakes were first set, the full power of resistance due to the dead weight of the entire balance of the train came at the point where the power of the moving engine was first applied. This appears from the testimony of the engineer (p. 30 Transcript of record):

"Q. Why, if the air had been put instantly on the whole train, as you afterwards ascertained, why had it been put upon the drivers of your engine at the same time?

"A. It did.

"Q. And then how do you explain that your engine pulled away from the tender?

"A. Because the engine was working steam, and there was no steam working the cars.

"Q. You were then forging straight ahead, knowing nothing had happened?

"A. Yes."

Whether or not this separation would have occurred a moment sooner or a moment later had there been an automatic coupling instead of the bar and pin is pure speculation, but in any event the failure to have such a coupling can in no sense be regarded as the proximate cause of this accident.

Jennings vs. Davis, 187 Fed. Rep., 704;
Patton vs. Railroad Co., 179 U. S., 663.

In directing a verdict for the defendant the learned trial judge said (Record, p. 76):

"All I can say to you, and I need not trouble you with the details upon the subject, is that I find nothing in the case to justify the charge of negligence that would justify me in submitting it to the jury."

The opinion filed by the learned Court below, refusing a motion for a new trial, is as follows:

McPherson, Judge (Record, p. 77):

> "That a locomotive engine—that is, the whole engine—is a 'car,' was decided in Johnson vs. Railroad Co., 196 U. S., 1; and it was accordingly held that the rear end of the tender, where the train is attached, must be equipped with an automatic coupler. But no decision has been cited that requires an automatic coupler between the engine proper and its tender, and there seems to be no reason for requiring it at that point.
>
> "I have read again the notes of testimony, and am still unable to find any evidence of the defendant's negligence. No presumption of fault exists in this class of cases; the doctrine of *res ipsa loquitur* does not apply; and in the absence of evidence all that can be said is that the liability of the defendant for this deplorable accident was not proved.
>
> "The motion for a new trial is refused."

The reasons which convinced the learned trial judge that the defendant was entitled to a judgment in its favor also satisfied the learned judges of the Circuit Court of Appeals that the judgment entered below should be affirmed, and the language used in the opinion of the Circuit Court of Appeals by Buffington, Circuit Judge, would seem to be a com-

plete answer to the argument now advanced to the contrary by the plaintiff in error.

That part of the opinion of Buffington, Circuit Judge, to which attention is particularly called, is as follows:

> "The negligence charged was an alleged violation by the railroad of the Act of Congress of March 2, 1893, which, plaintiff contended, required it to place automatic couplers between the forward end of a locomotive and its tender. The Act provides: 'It shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' In **Johnson vs. Southern Pacific Company,** 196 U. S., 16, the word 'car' was held to include a locomotive and that a railroad was bound to equip engines with automatic couplers, 'since engines have occasion to make couplings more frequently' than cars. On the theory that the effect of that decision is to hold 'that the engine is a car and that the tender is a car, each separate and apart from the other,' it is now contended that when these parts are coupled together to form a locomotive, it must be by an automatic coupler. We cannot agree to such a construction. To do so would be to lose sight

of the real purpose of the Act. The law was not passed to secure stronger car couplings, for the old fashioned link and pin were, when once made, and considered solely as couplings, possibly stronger and more reliable connections than automatic ones. It was the constant killing and maiming of men incident to going between the bumpers to couple and uncouple cars that the law sought to avoid and not to ensure the stability of the coupling after it was made, much less the stability between the parts of a locomotive itself. If the instability or insecurity of couplings after they were made had also been a recognized evil, and if Congress had meant to remedy such evil, the requirements of the Act would have extended not merely to the automatic character of the couplings, but also to their strength and durability. The union of engine and tender is in large measure a permanent one, and the act of joining the two is of such rare occurrence and is so alien to transportation, and an accident resulting from the joining of such parts so unheard of that Congress could not have had it in view to require an automatic coupler at that point.

"Agreeing, as we do, with the conclusion reached by the court below, that 'no decision has been cited that requires an automatic coupler between the engine proper and the tender, and there seems to be no reason for requiring it at that point,' the judgment is affirmed."

The statutory requirement with respect to equipping cars with automatic couplers was enacted in order to protect railroad employees as far as possible for risk incurred when engaged in coupling and uncoupling cars. Obviously an accident such as is disclosed by the record in this case was not contemplated by Congress and the Act has no reference to it.

In order to enable an employee to recover under the Act, where he has been injured by a car not properly equipped with automatic couplers, such improper equipment must have been the *proximate cause* of his injury, and he has the burden to show that as a fact. The plaintiff in error failed to sustain his burden.

The fireman for whose death this suit was brought was not injured between two cars where his presence was made necessary because of violation of the Act on the part of the defendant in failing to supply an automatic coupler. He was thrown from a position of safety because the engine was snapped from the tender when the brakes upon the train were set by the parting of the air hose at the other end. The cause of the accident which was the separating of the air hose,

is not attributed to any negligence on the part of the defendant according to the evidence disclosed by this record.

The plaintiff in this case proved nothing more than the mere happening of the accident, and from this proof endeavored to raise a presumption of negligence on the part of the defendant sufficient to carry the case to the jury.

The language of Mr. Justice Brewer, in **Patton vs. Railroad Company,** *supra*, clearly states the rule which may well be applied to this case:

> "Upon these facts we make these observations: First, that while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely (Stokes vs. Saltonstall, 13 Pet., 181 [10 L. Ed., 115]; Railroad Company vs. Pollard, 22 Wall, 341 [22 L. Ed., 877]; Gleason vs. Virginia Midland Railroad, 140 U. S., 435 [11 Sup. Ct., 859, 35 L. Ed., 458]), a different rule obtains to an employee. The fact of the accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to

> establish that the employer has been guilty of negligence. Texas & Pacific Railway vs. Barrett, 166 U. S., 617 (17 Sup. Ct., 707, 41 L. Ed., 1136). Second, that in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

There was not sufficient evidence in law to justify the learned trial judge in submitting this case to the jury, and no error was committed by the Circuit Court of Appeals for the Third Circuit in affirming the judgment of the District

Court of the United States for the Eastern District of Pennsylvania entered upon the verdict in favor of the defendant in error, for the reasons heretofore given.

It is therefore respectfully submitted that the judgment of the Court below should be affirmed.

WM. CLARKE MASON
CHARLES HEEBNER
Counsel for Defendant in Error.

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No. 469.

October Term, 1913.

IN THE

Supreme Court of the United States.

MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased,

Plaintiff in Error and Plaintiff Below,

vs.

PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania,

Defendant in Error and Defendant Below.

Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

Reply Brief for Plaintiff in Error.

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MARY GENEVIEVE PENNELL, Administratrix of the Estate of Jay Allen Pennell, Deceased, *Plaintiff in error and Plaintiff below,* *vs.* PHILADELPHIA AND READING RAILWAY COMPANY, a Corporation of the State of Pennsylvania, *Defendant in error and Defendant below.*	Oct. Term, 1913. No. 469.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

ARGUMENT.

In her first brief filed plaintiff in error referred specifically to the first Safety Appliance Act passed by Congress—the Act of March 2, 1893 (27 U. S. Stat. at L. 531, C. 196).

Plaintiff in error did this in a spirit of perfect fairness to defendant in error, as this was the original Safety Appliance Act. Defendant in error, however, in its brief has apparently confined its whole argument to the language of this first and original statute, and defendant in error asks this court to decide this case by construction of the language of this statute alone and principally that of section 2 of the statute.

Although plaintiff in error maintains, as more particularly set forth in her first brief, that a proper and precise construction of this statute will fully bear out her contention, yet, as must appear evident and as defendant in error has entirely overlooked, this statute cannot be construed standing alone, nor can its real meaning and intent be gleaned without this first statute being taken in connection with the other and subsequent Safety Appliance Acts, and these other and subsequent Safety Appliance Acts construed and applied likewise to the facts of this particular case. All these Safety Appliance Acts had been passed and were in force and effect at the time of the happening of this accident; therefore, the law, not only as expressed in one, but as shown and declared in all, is applicable to this case.

Under the first statute of 1893, it is true that we must bring the word "tender" within the definition of the word "car" in order to sustain the present contention of plaintiff in error. This phase of the matter has been gone into in detail by plaintiff in error in her first brief.

But this argument and searching for a clear definition in order to sustain the point plaintiff in error is trying to make, is totally unnecessary when we come to consider and apply the subsequent statutes, because here we find the word "tender" specifically used, and used too in evident contradistinction to the words "locomotives" and "cars." In the first section of the Safety Appliance Act of March 2, 1903, the tender is recognized, regarded, treated, designated and emphasized as a separate and distinct entity, car and vehicle.

Defendant in error in no part of its brief adverts to this Safety Appliance Statute of March 2, 1903, and apparently ignores it and its plain language and requirements.

The first section of the Safety Appliance Act Amendment, approved March 2, 1903 (32 Stat. at L. 943, c. 976), provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the provisions and requirements of the Act entitled, 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply IN ALL CASES, whether or not the couplers brought together are of the same kind, make or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains, locomotives, TENDERS, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and District of Columbia, and to all other locomotives, TENDERS, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives excepted by the provisions of section 6 of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways."

It is difficult to see how defendant in error can explain or avoid the very clear, emphatic and mandatory requirements of this statute as applied to the circumstances of the present case.

The brief filed for defendant in error seems to rely solely upon two arguments: (1) The general custom of railroads to have a bar and pin coupling be-

tween locomotive and tender; and (2) that the breaking of the bar and pin coupling between the tender and locomotive was not the proximate cause of the injury.

With regard to the statement and argument that railroads generally use draw-bar and pin coupling between locomotive and tender, and that railroads generally have failed to comply with the requirements of the Safety Appliance Acts and have neglected to install and use an automatic device between the locomotive and tender, plaintiff in error believes that she can safely rely upon such an argument as being no sufficient answer to the plain directions of these Safety Appliance Statutes. This court cannot seriously regard such an argument. If the plain dictates of the law of the land could be evaded and ignored by reason of custom, habit, individual preference, mental or moral bent, the limitations of convenience, etc., the affairs of the nation would very soon enter the chaotic stage.

The reply of defendant in error that the presence of the draw bar and pin coupling between the locomotive and tender was not the proximate cause of the accident likewise rests upon an unstable foundation.

The theory of proximate and remote cause, as applied to negligence cases, is, at the best, a misleading, fallacious, indefinite, intangible and unsatisfactory one, but, plaintiff in error contends, that so far as the circumstances of the present case are concerned it cannot be logically argued that the absence of an automatic coupling between the locomotive and tender, was not the proximate cause of this accident. Defendant in error can draw as fine distinctions as it pleases as to the possibility of the automatic coupling, *if it had been there*, breaking an instant before or an instant after the draw bar and pin coupling broke, but it cannot escape from the forceful and convincing fact

that every automatic coupling in the train held and the only coupling that did break was the draw bar and pin coupling between the locomotive and tender.

The strain, at the time of the happening of the accident, upon the draw bar and pin coupling between the locomotive and tender certainly could have been but little greater, if any, than the strain upon the automatic coupling between the rear end of the tender and the car next to it; yet the latter coupling held intact.

It was to be expected that a strain might and would be put upon the draw bar and pin coupling between the locomotive and tender, as well as upon all the other automatic couplings in the train, during the train's progress; and it was to be naturally expected that this strain might and would arise and originate from many different, likely and probable causes. The breaking of the air hose was one of these causes; but this fact should not justly make the breaking of the air hose the proximate cause of the accident and thereby relieve the railroad company of responsibility in its failure to place and use an automatic coupling between locomotive and tender.

This court has said that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

> Schaffer vs. Washington City, etc., Rwy. Co., 105 U. S. 249;
> Milwaukee & St. Paul R. R. Co. vs. Kellogg, 94 U. S. 469.

In the present case we are concerned with the violation and disobedience of an express, clear and emphatic provision and direction of an Act of Congress,

and the excuse that consequences flowing out of such violation and disobedience were not natural and probable and to be anticipated should not be a valid or timely one. But even supposing this court would listen to such excuse and explanation, it could not legally and justly be a proper and real extenuation in the circumstances of this case, because that a strain and stress would be put upon the couplings of this train, and all other trains, was to be expected. That strain and stress might arise from a broken wheel, a broken axle, a broken air hose (as here), the giving of a draw head, or from a thousand and one different things which might and do happen to freight trains every day of the year. This was no extraordinary or unusual strain as is shown by the facts of the slow rate of speed at the time of the occurrence, the level grade and the holding intact of all the other couplings on the train.

An accident such as this is no unheard of happening. Many such and entirely similar accidents have occurred and are now occurring. The records of the Interstate Commerce Commission reveal many similar cases, and this notwithstanding that under the rules of the Interstate Commerce Commission not all of such accidents are reported to it. Defendant in error cannot deny this fact to this court. Although, of course, it could not properly be proved and is not in the record of this case, at least two exactly identical accidents to the present one, in the knowledge of plaintiff in error, happened in Pennsylvania alone within the last year and a half, and in both instances the firemen were killed as here.

In the case of

Choctaw, Oklahoma & Gulf Railroad Company vs. Holloway, 191 U. S. 334,

decided by this court in 1903, the facts were as follows: The plaintiff in the court below, Holloway, was a fire-

man on one of defendant's locomotives. The brakes on this locomotive were out of repair, and there were no brake shoes on the brakes. The locomotive while running at night collided with a horse which had wandered upon a trestle. The engine was derailed and the plaintiff was caught between the tender and engine and seriously and permanently injured.

There, as here, it was contended that the proximate cause of the injury was not the defective brakes but the presence of the horse on the trestle. In overruling this contention, this court said:

> "We think this claim is unfounded, and that the proximate cause of the injury within the meaning of the law was the absence of the brakes on the engine. AT ANY RATE, THERE WAS EVIDENCE WHICH MADE IT A QUESTION FOR THE JURY TO SAY WHETHER THE ACCIDENT WOULD HAVE HAPPENED IF THERE HAD BEEN BRAKES ON THE ENGINE IN GOOD ORDER AND FIT FOR USE.
>
> "It may be assumed that there was no negligence on the part of the defendant by reason of which the horse came upon the trestle, and that it was not, therefore, responsible for any damage of which the horse was the sole and proximate cause. We think one proximate cause of the accident was the absence of the engine brakes. The purpose of a brake is to stop the engine more promptly than can be done without it, and if there had been a brake on the engine it would, if used, have probably prevented the accident. At any rate, there was evidence to that effect. The absence of a brake, which, if present, would have prevented the accident, was, therefore, a proximate cause thereof. *If an obstacle on the track which necessitates the using of the brake is to be regarded as the sole proximate cause of an accident which occurs only because there was no brake on the engine, the result would be that the company would never be*

liable, no matter what its negligence in not providing effective brakes, so long as its own negligence did not cause the presence of the obstacle on the track. This cannot be true."

So, in the present case plaintiff in error submits to this court that the purpose of a coupling device is to hold two cars together, and that if there had been an automatic coupling device as required by Federal Statute, between the locomotive and the tender, this accident probably would never have happened. The undisputed facts and circumstances of the occurrence all go to show this. At all events, was this not a question of fact for the jury? The absence of the automatic coupling between locomotive and tender which, if present, would probably have prevented the accident, was therefore the proximate cause of the accident. For this court to hold otherwise would be equivalent to saying that this defendant railroad company, and every railroad company, would never be liable in any case where the draw-bar and pin coupling between the locomotive and tender broke no matter what the cause of such breaking should be or from what source came the strain causing such breaking, so long as no proof could be made of the railroad company's negligence in causing and producing that strain. The strain might arise, as said above, from very many different sources, all entirely probable, natural, to be expected and foreseen. Can this court say that there can be no recovery in this case, where the deceased could not by any possibility be guilty of contributory negligence, and where, if the clear requirements of a Federal Statute had been complied with and obeyed by the railroad company employing him there is a very serious doubt, to say nothing of the extreme improbability, that such an accident would have occurred?

The terms "unexplained accident" and "unavoidable accident," so often relied upon as here, by defendant railroad companies, and so eagerly and expectantly advanced as valid excuses, are nicely rounded, well-intentioned and often-used expressions; but is their use justifiable and permissive in the present instance in the face of the disobedience of the plain dictates of a Federal Statute, the requirements of which statute, if regarded and obeyed, would in every likelihood have prevented this unfortunate man's death and have spared this woman and child the pangs, distress and hardship of widowhood and orphanhood?

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